In The

Supreme Court of the United States

October Term, 1976

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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This petition is filed on behalf of the American Petroleum Institute, a trade association of energy resource companies in the United States, and the following processors of energy resource products: Standard Oil Company (Ohio), Atlantic Richfield Company, Continental Oil Company, Exxon Company, U.S.A., Gulf Oil Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc. and Union Oil Company of California.

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 2, 1976.*

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* The Petitioners herein were petitioners in Case No. 75-1665 below.

OPINION BELOW

The Opinion of the Court of Appeals appears in Appendix A hereto. The opinion has not yet been published in the official reports, but it has been published at 9 ERC 1149.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on August 2, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Clean Air Act, as amended, authorizes the Administrator of the Environmental Protection Agency to require that state implementation plans under Section 110 of the Act include provisions in addition to the eight criteria specified by Section 110 for attainment of national ambient air quality standards.

2. Whether the absence of sufficiently definite standards in the Act renders any purported authority for the "significant deterioration" regulations unconstitutional under Article I, Section 1 of the U. S. Constitution.

3. Whether the Environmental Protection Agency has the constitutional authority to dictate land use policy for the states and to require the states to assume the administration of federal significant deterioration regulations as a condition for state retention of the ability to redesignate land areas within their boundaries from one EPA classification zone to another.

4. Whether it is arbitrary and capricious for administrative rule-making to impose numerical restrictions on pol-

lutant concentrations in ambient air that have no medical or scientific basis, and that will depend for enforcement upon diffusion modeling techniques that have been shown to be highly inaccurate and unreliable for use in the so-called "clean air" regions of the Nation.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution (Article I, Section 1, and the Tenth Amendment), are set forth in Appendix B. Relevant provisions of the Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857, et seq., are contained in Appendix C. The regulations are set forth in Appendix D.

STATEMENT OF THE CASE

This case involves the review of the so-called "significant deterioration" regulations promulgated by the Respondent, the Environmental Protection Agency (EPA), on November 27, 1974, 39 Fed. Reg. 42509 et seq. (Dec. 5, 1974).

The regulations were issued in response to an order of the United States District Court for the District of Columbia entered on May 30, 1972, in the case of *Sierra Club* v. *Ruckelshaus,* 344 F.Supp. 253 (D.D.C 1972). That order required the Administrator of EPA (i) to disapprove all state plans for the implementation of national air quality standards under the Clean Air Act if the plans did not contain, in addition to the eight criteria specified for such plans in Section 110 of the Act, 42 U.S.C. § 1857c-5, further provisions that would prevent degradation of existing air quality in areas where air quality is better than that required by the national primary and secondary standards, and (ii) to

promulgate regulatory revisions for the state plans to prevent such degradation.

A panel of the Court of Appeals for the District of Columbia Circuit affirmed the District Court order *per curiam*, *Sierra Club* v. *Ruckelshaus*, D.C. Cir. No. 72-1528 (Nov. 1, 1972), and because of an equally divided vote by the Supreme Court, *sub nom. Fri* v. *Sierra Club*, 412 U.S. 541 (1973), the District Court decision was allowed to stand.

Thereafter, the Administrator disapproved all state implementation plans, concluding that none of the plans contained significant deterioration provisions sufficient under the District Court's order, 37 Fed. Reg. 23836 (Nov. 1972), and began an informal rulemaking proceeding to develop regulatory revisions to the state plans that would protect against significant deterioration in the so-called "clean air" areas.[1] Final regulations on the subject were promulgated on November 27, 1974, 39 Fed. Reg. 42509 (Dec. 5, 1974).[2]

The Petitioners herein and others sought judicial review of the regulations pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1), and all petitions were consolidated in the Court of Appeals for the District of Columbia Circuit for review.[3] A panel of that Court rendered its decision on August 2, 1976, affirming the regulations as issued.

The regulations prescribe three classifications for areas with air quality better than the national standards. As ex-

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[1] As used in this petition, the term "clean air" areas refers to areas of the Nation where the air quality is better than that required by the primary and secondary standards established under Section 109 of the Clean Air Act, 42 U.S.C. § 1857c-4.

[2] Clarifying amendments were adopted January 16, 1975 (40 Fed. Reg. 2802), June 12, 1975 (40 Fed. Reg. 25004), and September 10, 1975 (40 Fed. Reg. 42011).

[3] The other petitioners in the consolidated proceedings below are listed in Appendix E.

plained in the preamble to the regulations, Class I is intended to apply to areas in which "practically any change in air quality would be considered significant"; Class II to areas where changes "normally accompanying moderate well-controlled growth" would be considered insignificant; and Class III to areas where "deterioration up to the national standards would be considered insignificant." 39 Fed. Reg 42510.

For Classes I and II, specific increment ceilings are prescribed for increases in sulfur dioxide and suspended particulates, to be measured from January 1, 1975.[4] For areas designated Class III, increases in particulates and sulfur dioxide are permitted up to the national standards.

Initially, all areas of the Nation with air quality better than the national standards are designated by the regulations as Class II. 40 C.F.R. § 52.21(c)(3). The regulations authorize the states to request the Administrator to redesignate an area to another class, based upon the area's anticipated growth, the social, environmental and economic effects of the redesignation, and the impacts the redesignation would have upon regional and national interests. A redesignation will not be approved, however, unless the state requests a delegation from EPA of the responsibility for carrying out the new source review requirements of the regulations discussed below. 40 C.F.R. §§ 52.21(c)(vi)(a).

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[4] The specific increment limitations are as follows:

Pollutant	Class I mg/m³	Class II mg/m³
Particulate Matter:		
Annual geometric mean	5	10
24-hour maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hour maximum	5	100
3-hour maximum	25	700

Preconstruction review is required for nineteen specified types of stationary sources of sulfur oxides or particulate matter,[5] and requires a determination by the Administrator or his delegate (the states) that emissions from that new source, together with emissions from all other sources (commercial, residential, industrial), will not violate the significant deterioration increments applicable to that area, or "any other area."[6] 40 C.F.R. § 52.21(d)(2)(i). In addition any such source is required to meet an emission limit, to be specified by the Administrator, which would result from application of the "best available control technology" for sulfur dioxide and particulate matter. 40 C.F.R. § 52.21 (d)(2)(ii).

REASONS FOR GRANTING THE WRIT

This petition brings anew to this Court the "significant deterioration" issue—an issue, Petitioners submit, that has grossly distorted and reversed the orderly and structured approach to air quality control intended by Congress in the Clean Air Act Amendments of 1970, and an issue that is totally at odds with this Court's recent interpretations of

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[5] (1) Fossil-fuel steam electric plants; (2) coal cleaning plants; (3) kraft pulp mills; (4) portland cement plants; (5) primary zinc smelters; (6) iron and steel mills; (7) primary aluminum ore reduction plants; (8) primary copper smelters; (9) municipal incinerators; (10) sulfuric acid plants; (11) petroleum refineries; (12) lime plants; (13) phosphate rock processing plants; (14) by-product coke oven batteries; (15) sulfur recovery plants; (16) carbon black plants; (17) primary lead smelters; (18) fuel conversion plants; (19) ferroalloy production facilities. 40 C.F.R. § 52.21(d).

[6] By referring to the effects of increments upon "any other area," the regulations thus impose a "shadow effects" rule that extends a zone's increment ceilings far beyond the boundaries of the zone itself. For most areas of the Nation, for example, EPA has suggested that a Class I inhibition could stretch 60 to 100 miles into a neighboring Class II or III area. 39 Fed. Reg. 42513 (Dec. 5, 1974).

the Act in *Train* v. *NRDC*, 421 U.S. 60 (1975), and *Union Elec. Co.* v. *EPA*, ... U.S. ....., 44 U.S. L. Week 5060 (June 25, 1976). Because of this Court's previous division on this issue,[7] a complex regulatory framework has been promulgated for the development of entirely new "tertiary" air quality standards more stringent than the primary and secondary standards contemplated by the Act. These regulations, if allowed to stand, will inhibit or prevent the future development of domestic energy resources located in "clean air" areas even though all standards set by EPA to protect the public health and welfare (*i.e.*, primary and secondary standards) are met.[8] As this Court recognized when it granted *certiorari* three years ago, the issue is of *fundamental importance* to the Nation as a whole; it now requires a definitive resolution by this Court.

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[7] *Fri* v. *Sierra Club*, 412 U.S. 541 (1973), affirming by a vote of four to four *Sierra Club* v. *Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972). Where the Supreme Court divides equally on an issue, "the principle of law presented by the case is left unsettled." *Laird* v. *Tatum*, 409 U.S. 824, 838 (1972) (memorandum by Rhenquist, J.). *Accord, Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 264 (1960); *United States* v. *Pink*, 315 U.S. 203, 216 (1942); *Hertz* v. *Woodman*, 218 U.S. 205, 213-14 (1910); *Etting* v. *Bank of United States*, 24 U.S. (11 Wheat) 59, 76 (1826).

[8] As a Supplemental Addendum to its brief below, the Petitioners submitted an analysis of the effects of the Class I limitations on the development of coal, oil shale and uranium resources located within the vicinity of areas likely to be designated as Class I (national parks, monuments and forests, and national wilderness and primitive areas). The analysis revealed that as much as 98% of Kentucky's and 86% of West Virginia's coal available for gasification and liquefaction could be precluded from development by the regulations. The vast mineral fuels resources of Montana, Wyoming, Colorado and Utah would be virtually blanketed by the shadow zones cast from Class I areas, and 100% of the extractable shale oil deposits in Colorado and Utah could be inhibited.

1. The Decision Below Conflicts With Recent Opinions Of This Court Interpreting The Exclusive Criteria Imposed By Section 110 Of The Clean Air Act For EPA Approval Of State Implementation Plans.

Subsequent to the previous *Sierra Club* litigation on the significant deterioration issue, this Court has rendered a number of important decisions interpreting the meaning and intent of key provisions of the Clean Air Act. Those decisions make clear the fallacy of the District Court's analysis in *Sierra Club* v. *Ruckelshaus,* 344 F.Supp, 253 (D.D.C. 1972), and are totally at odds with the Court of Appeals' interpretation of the Act in the present case.

At the heart of this controversy are the requirements for the content of state implementation plans which have been developed and submitted to EPA for approval under Section 110 of the Clean Air Act, 42 U.S.C. § 1857c-5. The *only* section of the Clean Air Act that addresses the requirements for state implementation plans is Section 110. In clear and precise language, that section specifies *eight distinct requirements* for state implementation plans—all related to the achievement and maintenance of the primary and secondary standards of Section 109 of the Act, *none requiring goals more stringent than the Section 109 standards.* Where the eight specified criteria are satisfied, Section 110 imposes the unequivocal requirement that the Administrator *"shall approve"* the state's plan.

It is undisputed by the court below that none of the criteria of Section 110 provide a basis for the requirement of significant deterioration provisions in state plans.[9] The Court

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[9] "[A] 1970 amendment to the Act, Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2), states that the Administrator 'shall approve' a state implementation plan which meets the criteria listed in that section, none of which implies a nondeterioration standard." ..... F.2d at ....., 9 ERC at 1134, slip op. at 19.

of Appeals has nevertheless affirmed pervasive regulatory revisions to all state implementation plans that go far beyond the mandatory provisions of Section 110 relying, not upon any of the other operative sections of the Act, but rather upon a portion of an introductory phrase to the Act which states that one of its purposes is "to protect and enhance the quality of the Nation's air resources. . . ." Clean Air Act § 101(b)(1), 42 U.S.C. § 1857(b)(1).[10] The opinions of this Court in recent decisions under the Clean Air Act, however, simply do not permit such a construction.

In *Train* v. *NRDC,* 421 U.S. 60 (1975), this Court held that state implementation plans may allow for variances for individual pollution sources so long as the plans achieve the national primary and secondary air quality standards by the statutory compliance date. In reaching that result,

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[10] The Court of Appeals totally disregards the remaining portion of the purpose clause, which continues ". . . so as to promote the public health and welfare and *the productive capacity of its population,*" a goal which certainly will be inhibited by the economic restraints imposed by the regulations.

The Court of Appeals also places heavy emphasis upon an administrative interpretation of "protect and enhance" language in the Air Quality Act of 1967, and upon a statement in a Senate committee report on the 1970 Amendments directing that the Administrator "should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance" of air quality that is already equal to, or better than, the national standards. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970). Completely ignored by the Court of Appeals, however, are the further indications from the legislative history that the specific strategy intended by Congress for dealing with the clean air areas was the new source performance standards of Section 111 (42 U.S.C. § 1857c-6). Thus, the Senate report referred to by the Court of Appeals further explains: "Maintenance of existing high quality air is assured through provision for maximum control of new major pollution sources." S. Rep. No. 91-1196, *supra* at 2. Similarly: "The overriding purpose of this section [111] would be to prevent new air pollution problems, and toward that end, maximum feasible control of new sources at the time of their construction is seen by the committee as the most effective and, in the long run, the least expensive approach." *Id.* at 16.

this Court necessarily examined the requirements of the Clean Air Act for the content of state implementation plans and concluded that Section 110(a)(2) "quite clearly mandates approval of any plan which satisfies its minimum conditions." 421 U.S. at 71 n. 11. The *Train* opinion further explained:

> "Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." 421 U.S. at 79. (Emphasis in original.)

The emphasis on the Section 110 criteria for the content of state implementation plans was restated in *Hancock* v. *Train*, ... U.S. ....., 44 U.S. L. Week 4767, 4768 (June 7, 1976), where this Court observed that EPA is "required to approve each State's implementation plan as long as it was adopted after public hearings and satisfied the conditions specified in § 110(a)(2)."

This Court's most recent interpretation on the matter was provided in *Union Electric Co.* v. *EPA*, ... U.S. ....., 44 U.S. L. Week 5060 (June 25, 1976), where the Court rejected the relevance of technological feasibility—a factor

not specifically prescribed by Section 110—to the statutory standards for approval by EPA of state implementation plans. The opinion states:

> "The provision [§ 110(a)(2)] sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator 'shall approve' the proposed state plan." 44 U.S. L. Week at 5063.

As against the suggestion that the Administrator might properly require factors other than those specified by Section 110, the *Union Electric* opinion firmly instructs:

> "The mandatory 'shall' makes it quite clear that *the Administrator is not to be concerned with factors other than those specified. . . .*" *Id.* (Emphasis added.)

The Court of Appeals below has discounted the relevance of the *Train, Hancock* and *Union Electric* decisions to the present case by arguing that the precise issue of "significant deterioration" was not before the Supreme Court in those cases. ..... F.2d at ....., 9 ERC at 1138-39, slip op. at 28.[11] What the Court of Appeals refuses to recognize, however, is that the fundamental issue addressed by this Court in each of the passages quoted above is precisely the fundamental issue of this case—whether state implementation plans need to satisfy requirements other than those specified in Section 110. On that basic issue, this Court has ruled

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[11] The Court of Appeals suggests that in *Train*, for example, the Supreme Court was concerned only with dirty air, not clean air. ..... F.2d at ....., 9 ERC at 1138, slip op. at 28. To the contrary, *Train* involved the question of individual variances from state implementation plans, plans that cover the *entire* air region of a state, clean air as well as dirty.

that a state implementation plan is subject *only* to the requirements of Section 110, and no others.[12]

In sum, this Court has ruled definitively with respect to the conditions under which the Administrator *must* approve state implementation plans. As Section 110 is completely devoid of any reference to any "no significant deterioration" or tertiary standards more stringent than the primary and secondary standards, the regulations have clearly been issued without statutory authority under the Clean Air Act and the Court of Appeals was in error for holding otherwise.

2. The Absence Of Any Sufficiently Definite Standards In The Act Renders Any Purported Authority For The Significant Deterioration Regulations Unconstitutional.

There are no standards in the Clean Air Act relating to significant deterioration. Under accepted construction,[13] without "sufficiently definite standards"[14] to guide EPA, any purported authority for these regulations is unconstitutional[15] EPA contends that simply the words "to protect

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[12] Another operative section of the Act further confirms this interpretation. Section 116, 42 U.S.C. § 1857d-1, provides that nothing in the Act shall preclude the right of any state to adopt its own air quality standards more stringent than the national standards. Thus, a state is *permitted* to adopt more stringent standards but it is *not required* to do so. The Court of Appeals' construction that the Act *mandates* more stringent standards renders Section 116 meaningless and a frivolous legislative act.

[13] *National Cable Television Association* v. *United States,* 415 U.S. 336, 342 (1974), confirming principles established by *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935) and *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935).

[14] *Lichter* v. *United States,* 334 U.S. 742, 786 (1948).

[15] Any authority granted EPA by Congress must, under Article I, Section 1 of the Constitution, be limited by sufficient standards, first to insure that the fundamental policy decision is made, not by appointed administrative officials, but by elected legislators; and, second, to provide judicial review some measure against which to judge any challenged administrative action. *Arizona* v. *California,* 373 U.S. 546, 626 (1963) (Harlan, Stewart and Douglas, J. J., dissenting in part.)

and enhance" provide sufficient statutory guidance for these regulations. However, until ordered to do so by the District Court in 1972, EPA believed nothing in the Act required it to regulate "significant deterioration" as, in the words of the then EPA Administrator, "I don't know what it means."[16]

At the least, this admission is consistent with Petitioners' view of the legislative history that Congress never intended such regulation. At the most, the admission shows that EPA was totally adrift in a sea of uncertainty, left to its own devices to fashion not just regulations but an actual policy of non-degradation. This was candidly admitted by the acting EPA Administrator when he said, "There is no guidance in the statute, virtually none in its legislative history, and the Courts have not discussed the meaning of their mandate. . . ."[17] It is little wonder that to this very day EPA is still seeking, in its own words, "explicit guidance" from Congress.[18]

The plain fact is that the purpose clause words "to protect and enhance" are merely that—a statement of purpose, not a standard. The distinction between a *purpose* and a *standard* was made clear by this Court in *United States* v. *Rock Royal Coop.*, 307 U.S. 533, 574 (1939), when it stated:

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[16] Ruckelshaus, Implementation of the Clean Air Act Amendments of 1970—Part 1, Hearings Before Subcommittee on Air and Water Pollution, Senate Committee on Public Works, 92d Cong., 2d Sess., at 272 (Feb. 18, 1972).

[17] Quarles, Transcript of EPA Hearings, Wash., D. C., Aug. 27, 1973, p. 8 (Transcript in record of this case at A. 43).

[18] EPA/FEA, "An Analysis of the Impact on the Electric Utility Industry of Alternative Approaches to Significant Deterioration," at 1 (Oct. 1975). Despite EPA's efforts, the 94th Congress failed to enact any significant deterioration legislation.

> "[E]ach enactment must be considered to determine whether it states the *purpose* which Congress seeks to accomplish *and the standards* by which that purpose is to be worked out with *sufficient exactness* to enable those affected to understand these limits." (Emphasis added.)

Congress did this in the Clean Air Act. It stated its purpose was "to protect and enhance" the Nation's air quality and then in section after section detailed precisely how EPA was to develop, implement and enforce the primary, secondary and new source performance standards designed to "achieve and maintain" the desired levels of air quality. Totally absent from this comprehensive statutory scheme, however, is any mention of "no significant deterioration" or any requirement that EPA establish tertiary standards, as it now seeks to do.

This critical difference between a legislative purpose and a standard has repeatedly been made by the Supreme Court. For instance, in *Yakus* v. *United States,* 321 U.S. 414, 424 (1944), in approving the delegation of authority to OPA under the Emergency Price Control Act, the Court stated:

> "[T]he purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed."

In the Clean Air Act, one searches in vain to find anything remotely resembling a standard describing the boundaries within which the Administrator should act to prevent significant deterioration. Consequently, if Congress did intend EPA to develop these regulations, it failed to articulate a "sufficiently definite standard" upon which EPA could construct, as it did for primary, secondary and new source

performance standards, a workable and enforceable regulatory scheme.[19]

3. The Significant Deterioration Regulations Impair The Sovereign Power Of The States To Determine Fundamental Land Use Policies And Controls And Require The States To Administer A Comprehensive Federal Regulatory Scheme In Violation Of The Tenth Amendment.

By means of the significant deterioration regulations, the Administrator of EPA has imposed severe limitations upon the future use and development of vast areas of the Nation. These limitations—in effect, federally mandated zoning classifications—have been prescribed by administrative fiat and usurp the traditional police powers of the states to regulate land use through zoning.[20]

Moreover, in order to exercise even the limited right to redesignate land areas within their boundaries from the restrictive Class II designation, which has now been federally mandated, to one of the two other land use classifications, the states must accept the responsibility for carrying

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[19] The dangers inherent in a conclusion that "protect and enhance" is a sufficient standard were emphasized in the following statement: "[T]he broad statutory language would give EPA virtually unfettered discretion to make legislative policy judgments which have serious social and economic effects. While such discretion may give EPA room to make creative regulatory solutions to environmental problems, it allows 'essentially lawless' decisions on environmental policy issues that vitally affect the public interest." Note, *Review of EPA's Significant Deterioration Regulations: An Example of the Difficulties of the Agency-Court Partnership in Environmental Law*, 61 Va. L. Rev. 1115, 1185 (1975).

[20] *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). See also Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451, et seq.

out the new source review requirements—as if the states and their employees were agents of the Federal Government.[21]

Such federal intrusion into the traditional state and local function of land use controls was a principal concern of several states that participated in the proceedings below. Thus, the State of New Mexico, in objecting to EPA's ability under the regulations to veto a redesignation desired by the state, argued that "such a reservation of power by the federal government violates the delicate federal-state relationship established by the Clean Air Act." Brief for Petitioner, State of New Mexico, in No. 75-1370, D.C. Cir. Ct. of App., at 24. Similar arguments were raised by the *amici* states of Wyoming, Alabama, Colorado, Kansas, Minnesota, South Dakota and Florida. See Amicus Curiae Brief of the State of Wyoming at 3-4.

The focus of the states' arguments is the explicit requirement of the Clean Air Act that "each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State," Clean Air Act § 107, 42 U.S.C. § 1857c-2(a), a provision which has been emphasized by the courts as reflecting the clear Congressional understanding that "state and local governments retain responsibility for the basic design and implementation of air pollution strategies." *Pennsylvania* v. *EPA*, 500 F.2d 246, 262 (3d Cir. 1974). Accord, *Train* v. *NRDC*, 421 U.S. 60, 64, 79 (1975).

Moreover, such federal intrusions into the state's prerogatives strike at the constitutional federalism embodied in the Tenth Amendment to the United States Constitution, which provides:

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[21] The regulations provide that the Administrator will not approve a requested redesignation if "the State has not requested and received delegation of responsibility for carrying out the new source review requriements." 40 C.F.R. § 52.21(c)(vi)(a).

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

That the Tenth Amendment provides legitimate protection against federal dominance of state functioning was emphasized by this Court in the recent case of *The National League of Cities* v. *Usery*, ... U.S. ....., 44 U.S. L. Week 4974 (June 24, 1976). Addressing the broad federal powers under the Commerce Clause, the *National League of Cities* opinion cautioned that, "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty," and it reiterated the Court's earlier observation:

> " 'While the Tenth Amendment has been characterized as a "truism" . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.' " 44 U.S. L. Week at 4976, quoting from *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975).

In holding that the application of minimum wage and maximum hour requirements under the Fair Labor Standards Act to state and local employees violates the Tenth Amendment, this Court observed that the Act "displaces state policies" as to the manner in which local governmental services will be provided the public, and "directly supplants the considered policy choices of the States' elected officials and administrators," 44 U.S. L. Week at 4978—observations which are equally pertinent to the control of local land use policy decisions by EPA's significant deterioration regulations.

These constitutional concerns are aggravated by the re-

quirement that the states assume the responsibility for administering and enforcing the significant deterioration regulations through the preconstruction review provisons. Three recent decisions from the courts of appeals for the Ninth, the Fourth and the District of Columbia Circuits, all of which are now pending before the Supreme Court for review, illustrate the significance of the Tenth Amendment in the face of similar regulatory provisions under the Clean Air Act. In *Brown* v. *EPA,* 521 F.2d 827 (9th Cir. 1975), *cert. granted,* ..... U.S. ..... (1976), the Ninth Circuit held that sanctions could not be applied against states that decline to enforce state implementation plans that have been prescribed by EPA. In interpreting the constitutional limits on federal power, the court held that the Federal Government could not tell a state how to exercise its police powers in the regulation of economic activities. The court agreed with the State's contention that "the Commerce Power does not extend to requiring a state to undertake such *governmental* tasks as might be assigned to it by Congress, or its proper delegate." 521 F.2d at 838 (emphasis in original). In the Ninth Circuit's words:

> "A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress." 521 F.2d at 839.

Similarly, the Fourth Circuit held that EPA could not impose conditions on the Maryland state implementation plan that would require that state to create provisions for automobile inspection, emission control retrofit, and bikeway systems. *Maryland* v. *EPA,* 530 F.2d 215 (4th Cir. 1975), *cert. granted,* ..... U.S. ..... (1976).

Consistent with the decisions in *Brown* and *Maryland,* the District of Columbia Circuit recently held that EPA's transportation control regulations to be incorporated into

the implementation plans for the National Capital Interstate Air Quality Control Region could not require the affected states to administer and enforce inspection and retrofit programs. *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), *cert. granted*, ... U.S. ..... (1976). That court reviewed the agency's rule-making authority under the Commerce Clause, and concluded:

> "[W]e draw the line and hold that the Administrator, in the exercise of federal power based solely on the commerce clause, cannot against a state's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by the Administrator. For example, the attempt to require the state to 'establish' each of the retrofit programs and to 'evaluate and approve devices for use in this program,' . . . is an impermissible encroachment on state sovereignty and goes beyond 'regulation' by the Congress. It seeks, under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation.
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> "In essence, *the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program* against the owners of motor vehicles. . . . Under the regulations here, the states are to function merely as departments of the EPA, following EPA guidelines and subject to federal penalties if they refuse to comply or if their regulation of vehicles is ineffective." 521 F.2d at 992 (emphasis added).

In the present case, the Court of Appeals has discounted the relevance of the foregoing cases by insisting that the states retain "broad discretion" for land use control under the significant deterioration regulations and "are required to

take no affirmative action." ..... F.2d at ....., 9 ERC at 1149, slip op. at 52-53. This is simply not true.

To begin with, EPA has placed all of a state's land with air quality better than the national standards into the limited growth Class II zone. If a state wants any of its land redesignated by EPA to either Class I or III, it must submit to EPA a hearing record which, among other things, shows that the state considered "the *social, environmental* and *economic effects* of such redesignation . . . upon *other areas* and *states*" and "*any impacts* . . . upon *regional* or *national* interests." 40 C.F.R. § 52.21(c)(3)(ii)(d). Not only is this an imposing administrative burden virtually unlimited in its scope, but it clearly commandeers a state agency to determine the impact of a federal program upon, of all things, interstate commerce.

The regulations then state that EPA will not approve a state's redesignation request where "the State has not requested and received delegation of responsibility for carrying out the new source review requirements." 40 C.F.R. § 52.21(c)(3)(vi)(a). Thus, unless a state is willing to have its land remain forever in Class II, where EPA has now by bureaucratic fiat placed them, it must, as a condition for redesignation, perform the administrative and technical functions of new source review.[22]

As a practical matter, then, unless the states are to capitulate completely to the federal government in the performance of such traditional local functions as land use zoning and control, the states must serve as agents of EPA in the implementation of the significant deterioration regu-

[22] The regulations authorize the Administrator to waive the delegation of authority condition for redesignations but only if the state's attorney general has determined that the state is without legal authority to accept such a delegation. 40 C.F.R. § 52.21(f).

lations. A more blatant infringement of state sovereignty can hardly be imagined, and a reversal by this Court will be essential to restore the sovereign integrity of the states assured under the Tenth Amendment.

4. The Court of Appeals Erred In Upholding The Increment Ceilings Prescribed By The Regulations Notwithstanding EPA's Admission That The Ceilings Have No Known Relationship To The Protection Of Health And Welfare And Are So Low As To Be Beyond The Capabilities Of Existing Modeling Technology To Predict With Any Reasonable Degree Of Accuracy.

Supreme Court review of this case is further required in order to make clear that regulatory actions under the Clean Air Act must, both under the statute and the Constitution, bear a rational relationship to the protection of the public health and welfare.

Section 109 of the Clean Air Act, 42 U.S.C. § 1857c-4, requires that the primary air quality standards be set at a level which will protect the public health, "allowing an adequate margin of safety." As recognized by the Senate Committee that drafted the Amendments:

> "Margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified." Sen. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970).

The secondary standards, in turn, are required to protect the public welfare "from any known or anticipated adverse effects." §109(b)(2), 42 U.S.C. § 1857c-4(b)(2). Further, as new knowledge is developed from time to time on the effects of air pollutants, the Act clearly contemplates that the primary and secondary standards will be adjusted.

§ 109(b)(1) and (2), 42 U.S.C. § 1857c-4(b)(1) and (2).[23]

In issuing the significant deterioration regulations, EPA has prescribed a tertiary level of standards that goes beyond even an "adequate safety margin" for the protection of health and welfare and attempts to regulate the unknown and the unanticipated. EPA has been unable to relate the increment standards prescribed to any effects on health and welfare. To the contrary, in its first proposal of the regulations EPA acknowledged the virtual impossibility of establishing such a relationship, saying:

> "Pending the development of adequate scientific data on the kind and extent of adverse effects of air pollutant levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare." 38 Fed. Reg. 18987 (July 16, 1973).

Indeed, a special task force within EPA assigned to assess the no significant deterioration regulations concluded that the regulations would have no known positive health benefits:

> "[B]arring unknown or inconsequential health risks, emission standards more stringent than the secondary standards would produce no direct health benefits. They would, however, entail certain health risks." EPA Memorandum, "Findings of Task Force on Significant

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[23] In expressly providing for judicial review of the primary and secondary standards, Congress has made EPA strictly accountable in its adjustments of the standards in the light of newly developed information from time to time. § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1).

> Deterioration," Dec. 20, 1973, at G-36 (This memorandum in record of this case at A. 257).[24]

As further lamented by an EPA Hearing Officer during public hearings on the proposed regulations:

> "[I]t is this agency that has the responsibility of filling in those blanks and explaining to people what they have done. At this point, we don't know what any of those numbers mean." Transcript of Hearings, Washington, D. C., Aug. 29, 1973, pp. 488-89 (Transcript in record of this case at A. 58).

EPA's admissions in this regard cut against the expressed purpose of the Act, heavily relied upon by the District Court in the initial *Sierra Club* litigation, "to protect and enhance the quality of the Nation's air resources *so as to promote the public health and welfare.*" Clean Air Act § 101(b), 42 U.S.C. § 1857. Whether the significant deterioration regulations truly will promote the public health and welfare is unknown, as the agency can offer no assurances in that regard.

The absence of an articulated relationship between the regulations and the health and welfare goals of the Act also has constitutional implications. As early established by this Court:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do

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[24] The EPA Task Force identified the following adverse risks of the regulations: First, by inhibiting development in the sparsely-populated pristine areas, the rules will limit further industrial growth to the densely-populated urban areas, thus increasing the national per-capita exposure to air pollution. Second, any restrictions on economic growth will cause increases in unemployment in the impoverished rural areas and higher consumer prices—results the Task Force characterized as "adverse second-order health effects." EPA Memorandum, Dec. 20, 1973, *supra* at G-36, -37.

> not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that *the means selected shall have a real and substantial relation to the object sought to be attained. Nebbia* v. *New York,* 291 U.S. 502, 525 (1934) (emphasis added).[25]

Here, whether the means selected (the significant deterioration increment ceilings) have "a real and substantial relation" to the goals of the Clean Air Act (the promotion of health and welfare) is totally unknown.

To make matters worse, the increment ceilings prescribed are so low as to be beyond the range of existing diffusion modeling technology, the principal mechanism for enforcing the regulations,[26] to predict with any reasonable degree of certainty. This, too, has been admitted by EPA. An EPA working group assigned to consider regulatory alternatives

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[25] The demands of due process may be minimal, but they nevertheless are demands to be observed. In *Weaver* v. *Palmer Bros. Co.,* 270 U.S. 402 (1926), for example, this Court struck down on due process grounds a statute prohibiting the use of secondhand shoddy in mattresses, finding that the prohibition was not rationally related to the protection of health.

[26] Under the regulations, before any plant of the type specified (see n. 5 *supra*) is constructed or modified, a determination must be made by the enforcing agency as to whether emissions from that plant, together with emissions from all other sources (commercial, residential, industrial) will cause the relevant increment ceilings for *any* area affected to be exceeded. That determination, EPA suggests, will be made on the basis of a computer prediction, known as diffusion modeling, as to the increment increases in sulfur dioxide and particulates that would result from the new or modified plant and other sources having a change in impact on the area since 1974. 39 Fed. Reg. 31003 (Aug. 27, 1974).

for a no significant deterioration rule, tendered the following critical assessment of diffusion modeling:

> "It is also the opinion of the working group that current diffusion modeling techniques are not sufficient to predict the air quality impact of a source with the required degree of precision." Memorandum from J. Padgett to R. L. Sansom, "Report of Conclusions Reached by Working Group," at 2 (Memorandum in record of this case at A. 1126).[27]

The Court of Appeals' answer to this problem is to accept EPA's assertion that the modeling predictions are intended to serve as "benchmarks" only, and to suggest that a state may adjust the increment ceiling "guidelines" for future development on the basis of actual changes in the measurement of pollution levels from time to time. ..... F.2d at ....., 9 ERC at 1145, slip. op. at 43-44. These characterizations are totally incorrect, as the increment ceilings are absolute numbers, designed to place precise limits on the amount of growth in a given air shed, and unless a proposed facility can establish by the very imprecise art of modeling that it will not exceed those numbers, that plant cannot be built or that resource cannot be developed.

Unfortunately, hard, expensive decisions—decisions which may determine the life style and future course of the Nation in its struggle to obtain energy self-sufficiency—will depend upon the so-called "benchmarks" the computer models will

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[27] In an independent study of available modeling technology supplied by the Petitioners to the Court below, it was shown that diffusion modeling in "clean air" areas exhibits an uncertainty factor of five or more. Greenfield Attaway & Tyler/Systems Application, Inc., "An Examination of the Accuracy and Adequacy of Air Quality Models and Monitoring Data for Use in Assessing the Impact of EPA Significant Deterioration Regulations on Energy Development" (Aug. 8, 1975), at VI-88 (submitted as a Supplemental Addendum to Petitioners' brief in the proceedings below).

produce. If the "benchmarks" are wrong, and the Court of Appeals' decision is allowed to stand, "black box wizardry" not factual data, will have dictated critical land use, growth and energy development decisions for generations to come.

Stated simply, the significant deterioration regulations the Court of Appeals has approved are not workable in the real world. With no clear indication that the regulations will benefit the public health and welfare, they must be set aside as arbitrary and capricious.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia Circuit

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2063

SIERRA CLUB, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
RESPONDENTS

THE DAYTON POWER & LIGHT CO. ET AL., INTERVENORS

No. 74-2079

SIERRA CLUB ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
RESPONDENTS

No. 75-1368

PUBLIC SERVICE COMPANY OF COLORADO ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1369

UTAH POWER & LIGHT COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1370

STATE OF NEW MEXICO EX REL. NEW MEXICO ENVIRONMENTAL IMPROVEMENT AGENCY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1371

PACIFIC COAL GASIFICATION COMPANY ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1372

UTAH INTERNATIONAL, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1575

INDIANA-KENTUCKY ELECTRIC CORPORATION ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1663

THE DAYTON POWER & LIGHT COMPANY ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1664

BUCKEYE POWER, INC. ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL., RESPONDENTS

SIERRA CLUB ET AL., INTERVENORS

No. 75-1665

AMERICAN PETROLEUM INSTITUTE ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1666

ALABAMA POWER COMPANY ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1763

MONTANA POWER COMPANY ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1764

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL., RESPONDENTS

SIERRA CLUB ET AL., INTERVENORS

Petitions for Review of Regulations Promulgated by the Environmental Protection Agency

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Argued June 9, 1976

Decided August 2, 1976

Judgment entered this date

Bruce J. Terris, with whom *Nathalie V. Black*, *John D. Hoffman*, and *H. Anthony Ruckel* were on the brief,

for petitioners in Nos. 74-2063 and 74-2079 and intervenors Sierra Club *et al.*

Henry Charles Griego for petitioner in No. 75-1370. *Toney Anaya*, Attorney General of the State of New Mexico, and *Robert A. Engel*, Special Assistant Attorney General, New Mexico Environmental Improvement Agency, were on the brief for petitioner in No. 75-1370.

John J. Adams, with whom *Joseph C. Carter, Jr.* and *David F. Peters* were on the brief, for petitioners in No. 75-1665; also entered an appearance for intervenors American Petroleum Institute *et al.* in No. 75-1663.

Gerry Levenberg, with whom *Carl B. Nelson, Jr.*, *Sidney G. Baucom*, *Verl R. Topham*, and *Girts Krumins* were on the brief, for petitioners in Nos. 75-1368 and 75-1369; also entered an appearance for intervenor Utah Power & Light Co. in No. 74-2063.

Francis M. Shea, with whom *Richard T. Conway*, *David Booth Beers*, *James R. Bieke*, *Michael J. Ruffatto*, and *Jon L. Kyl* were on the brief, for petitioners in Nos. 75-1763 and 75-1764.

Richard J. Denny, Jr., Assistant General Counsel, Environmental Protection Agency, and *Erica L. Dolgin*, Attorney, Department of Justice, with whom *Peter R. Taft*, Assistant Attorney General, *Robert V. Zenner*, General Counsel, Environmental Protection Agency, and *Edmund B. Clark* and *Earl Salo*, Attorneys, Department of Justice, were on the brief, for respondents. *Wallace H. Johnson*, Assistant Attorney General at the time the record was filed, also entered an appearance for respondents.

James W. McCartney, *Norman D. Radford, Jr.*, *K. R. Edsall*, and *Jane C. L. Goichman* were on the brief for petitioners in No. 75-1371.

C. C. Dietrich, Robert M. Westberg, and *Richard N. Carpenter* were on the brief for petitioner in No. 75-1372.

Jerry P. Belknap, Jon D. Noland, and *Bryan G. Tabler* were on the brief for petitioners in No. 75-1575. *Fred P. Bamberger* also entered an appearance for petitioners in No. 75-1575.

Wilson W. Snyder was on the brief for petitioners in Nos. 75-1663 and 75-1664. *Harry H. Voight, Henry V. Nickel, Eugene R. Fidell,* and *Edward L. Cohen* also entered appearances for petitioners in Nos. 75-1663 and 75-1664.

John P. Scott, Jr., Eugene T. Holmes, and *Eaton A. Lang* were on the brief for petitioners in No. 75-1666.

Jon L. Kyl and *Michael J. Ruffatto* were on the brief for intervenors Western Energy Supply and Transmission Associates *et al.* in No. 74-2063.

Marilyn S. Kite filed a brief on behalf of the States of Alabama, Colorado, Kansas, Minnesota, South Dakota, and Florida as *amici curiae.*

Nicholas C. Yost and *Edward L. Rogers* filed a brief on behalf of the States of California and Maine as *amici curiae.*

Harry H. Voight, Henry V. Nickel, and *Eugene R. Fidell* entered appearances for intervenors The Dayton Power & Light Co. *et al.* in No. 74-2063.

Henry Brown entered an appearance for intervenors Western Energy Supply and Transmission Associates *et al.* in No. 74-2063.

Raphael Moses entered an appearance for petitioner Platte River Power Authority in No. 75-1368.

David Booth Beers entered an appearance for petitioner Pacific Power & Light Company in No. 75-1368.

Before WRIGHT, ROBINSON, and WILKEY, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*:

I. INTRODUCTION

One of the primary purposes of the Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970), is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population * * *." Section 101(b)(1), 42 U.S.C. § 1857(b)(1). Pursuant to the court order in *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D. D.C. 1972), *aff'd per curiam*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court, sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973), the Administrator of the Environmental Protection Agency (EPA) promulgated regulations designed to prevent "significant deterioration" of air quality in those areas which have air that already is cleaner than the national ambient air quality standards.[1] The regulations employ a classifica-

[1] The twin objectives of the Clean Air Act are to improve air quality where pollution levels do not meet national minimum standards, and to protect the quality of air that already, as in this case, is cleaner than national standards. *See* Part V-A of this opinion *infra*. Accomplishment of those objectives is to be a joint enterprise of the federal government and the states, the former providing informed guidance to the implementation efforts of the latter. *See* §§ 101(a)(3), (4) of the Act, 42 U.S.C. §§ 1857(a)(3), (4).

Section 108 of the Act, 42 U.S.C. § 1857c-3, required the Administrator of EPA to publish a list of air pollutants which have "an adverse effect on public health or welfare." The Administrator was then to promulgate national primary and secondary ambient air quality standards for those specified pollutants. National *primary* air quality standards are those "the attainment and maintenance of which * * * are requisite

to protect the public health"; national *secondary* standards are those "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Section 109, 42 U.S.C. § 1857c-4. The Administrator has promulgated national primary and secondary air quality standards for six pollutants: sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. 40 C.F.R. §§ 50.4—50.11 (1975).

The states are charged with the duty to develop implementation plans designed to achieve the level of air quality prescribed by the national primary and secondary standards:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 107, 42 U.S.C. § 1857c-2. The plans are submitted to the Administrator for approval under the provisions of § 110 of the Act, 42 U.S.C. § 1857c-5 (1970), *as amended* (Supp. IV 1974). A proposed implementation plan must satisfy the requirements of § 110(a)(2)(A)-(H), 42 U.S.C. § 1857c-5(a)(2)(A)-(H), which requirements include attainment of the national primary standards within three years after approval of the plan, and attainment of the secondary standards within a "reasonable time." Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

Section 110 also provides that the Administrator is promptly to prepare and publish his own regulations for a state if (a) it fails to submit a plan, (b) the plan "is determined by the Administrator not to be in accordance with the requirements of this section," or (c) the state fails to revise its plan pursuant to a provision required by § 110(a)(2)(H). Section 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection (c)(1) of § 110 also contains a conditional hearing requirement for these "replacement" implementation plans: "If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation." Subsection (a)(2)(H) requires that an implementation plan provide for revision (i) to take

tion scheme under which these "clean air" regions may be designated Class I, II, or III. All such areas initially are designated Class II, under which specified increments in sulfur dioxide and particulate matter pollution are considered "insignificant." A state, Indian territory, or federal land may be redesignated after hearing and by application to EPA. Designation as Class I implies a region of very clean air, in which relatively small increments in air pollution would be considered significant deterioration; Class III areas are those in which deterioration of air quality to the national ambient air quality standards would be considered insignificant.

The court has heard the regulations attacked from several perspectives. Petitioner Sierra Club contends that the regulations fail, in a variety of ways, to prevent significant deterioration of existing clean air. The States of New Mexico, Wyoming, and California [2] agree in some respects with Sierra Club, but are concerned that the regulations infringe on the general regulatory authority vested in the states by the Clean Air Act. A large number of electric power companies and industrial organizations have argued that the regulations are not

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account of changes in either technology or the national standards and (ii) whenever the Administrator determines that the plan is inadequate to achieve the primary or secondary standards.

The basic structure described above is supplemented by § 111 of the Act, 42 U.S.C. § 1857c-6 (1970), *as amended* (Supp. IV 1974), which provides for promulgation of "standards of performance" for emission limitations of significant new sources of pollution, by categories of sources. The standards must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."

[2] The three named states are joined by Maine, Alabama, Colorado, Kansas, Minnesota, South Dakota, and Florida.

authorized by the Clean Air Act, that their promulgation was procedurally defective, that the allowable increments are arbitrary and capricious, and that the regulatory structure created by the regulations is unconstitutional.

We conclude that the Administrator's action is rationally based and has not been shown to be either without his authority or unconstitutional. We therefore do not disturb the regulations as promulgated.

II. Litigation History

Suit was filed in May 1972 by the Sierra Club and other environmental protection groups for a declaratory judgment that the Clean Air Act prohibited approval of state implementation plans which permitted significant deterioration of air cleaner than the national secondary standards, and for injunctive relief to prevent the Administrator from approving those portions of state implementation plans which would permit significant deterioration. District Judge John H. Pratt granted plaintiffs' motion for a preliminary injunction and declared invalid an EPA regulation [3] which had required only that state implementation plans "be adequate to prevent * * * ambient pollution levels from exceeding * * * [the applicable] secondary standard." *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D. D.C. 1972). The Administrator was enjoined from approving any state plan "unless he approves the state plan subject to subsequent review by him to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator." [4]

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[3] 40 C.F.R. § 51.12(b) (1975).

[4] *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972), JA Vol. IV at 1487.

As is apparent from the provisions of the Clean Air Act outlined above,[5] prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act. Judge Pratt based his decision, rather, on the "protect and enhance" language of Section 101(b)(1) of the Act and on the legislative history of both the Clean Air Act of 1970 and the Air Quality Act of 1967.[6] The decision was affirmed *per curiam* by this court, 4 E.R.C. 1815 (1972), and was affirmed by an equally divided Supreme Court, *sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

Pursuant to that order, the Administrator reviewed and disapproved all state plans insofar as they failed to provide for prevention of significant deterioration. 37 Fed. Reg. 22836 (November 9, 1971). Four alternative sets of regulations were proposed for public comment, in an effort to determine what meaning to give the concept of "significant deterioration."[7] Final regu-

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[5] *See* note 1 *supra*.

[6] The legislative history is discussed at notes 32-38 *infra*.

[7] 38 Fed. Reg. 18986 (July 16, 1973). In proposing alternative solutions, EPA posed for public debate the problem of how significant deterioration was to be defined:

> The basis for preventing significant deterioration * * * lies in a desire to protect aesthetic, scenic, and recreational values, particularly in rural areas, and in concern that some air pollutants may have adverse effects that have not been documented in such a way as to permit their consideration in the formulation of national ambient air quality scientific data on the kind and extent of adverse effects of air pollution levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare.
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> The relative significance of air quality versus economic growth may be a variable dependent upon regional conditions. For example, relatively minor deterioration of the

lations were published December 5, 1974, 39 Fed. Reg. 42509, and were amended slightly on January 16, 1975 (40 Fed. Reg. 2802), June 12, 1975 (40 Fed. Reg. 25004), and September 10, 1975 (40 Fed. Reg. 42011).

III. The Regulations

In promulgating final regulations [8] EPA was concerned primarily with the meaning of "significant deterioration." As it stated in the discussion preceding the new regulations:

> Most of the comments implicitly recognized that there is a need to develop resources in presently clean areas of the country, and that significant deterioration regulations should not preclude all growth, but should ensure that growth occurs in an environmentally acceptable manner. However, there are some areas, such as national parks, where any deterioration would probably be viewed as significant. A single nationwide deterioration increment would not be able to accommodate these two situations.

39 Fed. Reg. at 42520. The solution was to prescribe, for those areas with air cleaner than the national stand-

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> aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air." Conversely, in areas with severe unemployment and little recreational value, the same level of deterioration might very well be considered "insignificant" in comparison to the favorable impact of new industrial growth with resultant employment and other economic opportunities. Accordingly, the definition of what constitutes significant deterioration must be accomplished in a manner to minimize the imposition of inequitable regulations on different segments of the Nation.

Id. at 18987, 18988.

[8] "Prevention of Significant Air Quality Deterioration," 39 Fed. Reg. 42510 (Dec. 5, 1974).

ards, three classes of allowable total increments above the levels of particulate matter and sulfur dioxide pollution as of January 1, 1975, with the intention that each area could determine which class would prevent significant deterioration of its air in light of the area's air quality and social and economic needs and objectives:

> Class I applie[s] to areas in which practically any change in air quality would be considered significant; Class II applie[s] to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applie[s] to those areas in which deterioration up to the national standards would be considered insignificant.
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> Since the consideration of "air quality factors" alone essentially leads to an arbitrary definition of what is "significant," this term only has meaning when the economic and social implications are analyzed and considered. Therefore, the Administrator believes that it is most important to recognize and consider these implications, since the consideration of air quality factors alone provides no basis for selecting one deterioration increment over another.

Id. The regulations, 40 C.F.R. §§ 52.01(d), (f), and 52.21 (1975), were promulgated as amendments to the disapproved state implementation plans.[9]

All areas initially are designated Class II,[10] and may be redesignated by proposal of a state, federal land manager, or Indian governing body where the state has

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[9] Part 52 of 40 C.F.R. "sets forth the Administrator's approval and disapproval of State plans and the Administrator's promulgation of such plans or portions thereof." 40 C.F.R. § 52.02(a) (1975). Each state implementation plan has been amended to incorporate by reference the new regulations. *See, e.g.*, 40 C.F.R. §§ 52.96 (Alaska), 52.144 (Arizona), 52.181 (Arkansas).

[10] 40 C.F.R. § 52.21(c)(3)(i) (1975).

not assumed jurisdiction over Indian lands.[11] Federal land may be designated only to a more restrictive classification than that provided by the state(s) in which it is located.[12]

A state may redesignate if a hearing is held after notice to states, federal land managers, and Indian governing bodies that may be affected,[13] and if the proposed redesignation is based on the record of the hearing,

> which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the areas being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.[14]

A redesignation is to be approved if the state has complied with the listed requirements, has not "arbitrarily and capriciously disregarded" the considerations listed in the passage quoted above, and has undertaken the new source review requirements of Sections 52.21(d) and (e), discussed below.[15] 40 C.F.R. § 52.21(c)(3)(vi)(*a*) (1975).[16] Federal land managers and Indian gov-

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[11] 40 C.F.R. §§ 52.21(c)(3)(ii), (iii), (iv), (v) (1975).

[12] 40 C.F.R. § 52.21(c)(iv) (1975).

[13] 40 C.F.R. §§ 52.21(c)(3)(ii)(*a*)-(*c*) (1975).

[14] 40 C.F.R. § 52.21(c)(3)(ii)(*d*) (1975).

[15] *See* discussion at notes 20-23 *infra*.

[16] In the event of a protest by a state or Indian governing body to a redesignation proposed by another state, federal land manager, or Indian governing body, the Administrator may approve the proposal "only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and

erning bodies are subject to requirements parallel to those imposed on the states, with the added requirement that they consult with the state(s) in which they are located.[17]

If an area is designated as Class I or II, the allowable incremental pollution is measured from January 1, 1975.[18] No increments are specified for Class III; areas so designated are required to meet only the national secondary standards.[19]

Enforcement of the limitation on incremental pollution is accomplished partly through preconstruction review of 19 categories of stationary sources considered to be significant sources of pollution.[20] Permission to construct or to modify significantly one of the listed stationary sources is conditioned on a showing that the source's emissions, together with all other increases or decreases in emissions in the area since January 1, 1975, will not

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upon other areas and States; and any impacts upon regional or national interests." 40 C.F.R. § 52.21(c)(3)(vi)(*e*) (1975).

[17] 40 C.F.R. §§ 52.21(c)(3)(iv), (v) (1975).

[18] 40 C.F.R. § 52.21(c)(2)(i) (1975). The increments are prescribed in the following table, included in the cited subsection:

Pollutant	Class I (ug/m³)	Class II
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

[19] 40 C.F.R. § 52.21(c)(2)(ii) (1975).

[20] 40 C.F.R. § 52.21(d)(1)(i)-(xix) (1975).

violate the air quality increments applicable to *any* area.[21] The source also must meet an emission limit, specified by the Administrator, "which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide." [22] Preconstruction review of new proposed sources will be conducted by the Administrator or, by delegation, by the individual states.[23]

Last, it should be noted that the described classification scheme is no procrustean bed to which all states are to be bound. The states retain the option of proposing an alternative method of preventing significant deterioration of air quality, thereby abandoning the regulatory framework described by the regulations under review. As EPA stated in proposing regulations:

> The State plans need not be identical to the regulations proposed herein, but should be developed to accommodate more appropriately individual conditions and procedures unique to specific State and local areas. States are urged to develop and submit individual plans as revisions to State Implementation Plans as soon as possible. When individual

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[21] 40 C.F.R. § 52.21(d)(2)(i) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

[22] 40 C.F.R. § 52.21(d)(2)(ii) (1975). "Best available control technology" is defined as equivalent to the new source performance standards promulgated under § 111 of the Clean Air Act, 42 U.S.C. § 1857c-6. *See* discussion at note 1 *supra*. If no standard of performance has been promulgated for a source, best available control technology is determined on a case-by-case basis. 40 C.F.R. § 52.01(f) (1975).

[23] 40 C.F.R. § 52.21(f) (1975). *See also* 40 C.F.R. § 52.21(d)(4) (1975), which provides for cooperation between the Administrator and federal land managers for review of new sources on federal land, and between the Administrator and the Secretary of the Interior as to lands over which a state has not assumed jurisdiction.

> State Implementation Plan revisions are approved as adequate to prevent significant deterioration of air quality, the applicability of the regulations proposed herein will be withdrawn for that State.

39 Fed. Reg. at 31000 (August 27, 1974).

IV. Standard of Review

It is well settled that EPA rulemaking is reviewed under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(D) (1970). *Ethyl Corp. v. EPA*, —— U.S.App.D.C. ——, ——, —— F.2d ——, ——, slip op. at 66-74 (No. 73-2205, decided March 19, 1976). We must determine whether the Agency's action, findings, and conclusions are invalid as procedurally defective (§ 706(2)(D)), in excess of legislative authority (§ 706(2)(C)), unconstitutional (§ 706(2)(B)), or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (§ 706(2)(A)).

The "arbitrary and capricious" standard requires that agency action be affirmed if a rational basis exists therefor [24]; it is not for us to inquire into whether the decision is wise as a matter of policy, for that is left to the discretion and developed expertise of the agency.[25] The Supreme Court has cautioned, with respect to review under the "arbitrary and capricious" standard, that the reviewing court is limited to deciding whether there has been a "clear error of judgment * * *. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park*

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[24] *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974).

[25] *National Ass'n of Food Chains, Inc. v. ICC*, —— U.S. App.D.C. ——, ——, —— F.2d ——, ——, slip op. at 13 (No. 75-1471, decided May 18, 1976) (*per curiam*).

v. Volpe, 401 U.S. 402, 416 (1972). *See Ethyl Corp. v. EPA*, *supra*, —— U.S.App.D.C. at —— n.74, —— F.2d at —— n.74, slip op. at 69 n.74.

We therefore must assure ourselves that the Agency has presented a rational basis for its decision [26]; that it "demonstrably has given reasoned consideration to the issues, and has reached a result which rationally flows from its conclusions." [27]

V. ARGUMENT

A. Should *Sierra Club v. Ruckelshaus* be rejected on further consideration?

The question whether the Clean Air Act should be interpreted to prohibit significant deterioration of air cleaner than the national standards is necessarily the first level of analysis. Although this issue was decided by the earlier *Sierra Club v. Ruckelshaus* litigation, it is contended by the industrial petitioners (1) that the decision was clearly wrong on the merits and should be reconsidered, and (2) that the later decision in *Train v. NRDC*, 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are inconsistent with the prior decision in *Sierra Club v. Ruckelshaus*.

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[26] We note that the basis of agency action must be provided *by the agency*; an order "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding * * *." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see National Ass'n of Food Chains, Inc. v. ICC*, *supra* note 25, —— U.S.App.D.C. at ——, —— F.2d at ——, slip. op. at 12-13.

[27] *National Ass'n of Food Chains, Inc. v. ICC*, *supra* note 25, —— U.S.App.D.C. at ——, —— F.2d at ——, slip op. at 14.

The first argument obviously would require the clearest showing that *Sierra Club v. Ruckelshaus* was incorrectly decided, since Judge Pratt's decision was affirmed by both another panel of this court and an equally divided Supreme Court. It is posited that neither the "protect and enhance" language of Section 101(b)(1) nor the legislative history of the Clean Air Act need be read to impose a requirement of nondeterioration; petitioners then point out that, to the contrary, a 1970 amendment to the Act, Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2), states that the Administrator "shall approve" a state implementation plan which meets the criteria listed in that section, none of which implies a nondeterioration standard. The conclusion advanced by petitioners is that the judicially-created requirement of nondeterioration violates this plain language of the 1970 amendment.

When a specific provision of a total statutory scheme reasonably may be construed to be in conflict with the congressional purpose expressed in the act, our first task is to examine the act's legislative history to determine whether the specific provision is reconcilable and consistent with the intent of Congress.[28] We find, in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards. Inasmuch as we find no support for the proposition that the addition of Section 110(a)(2) was intended to limit that policy in any way, we reaffirm our prior holding in *Sierra Club v. Ruckleshaus.*

The "protect and enhance" language of the Clear Air Act was added by the Air Quality Act of 1967, 81 STAT.

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[28] *See FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968): "[W]e cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate."

485.[29] The administrative interpretation and, to a lesser degree, the legislative history of the Air Quality Act expressed a policy of nondeterioration,[30] and that policy appears generally to have been accepted at the time of the addition of the Clean Air Act amendments of 1970.

In the Senate hearings on the Clean Air Act amendments of 1970, the officials charged with implementation of the 1967 Act expressed their clear understanding that

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[29] *Air Quality Act of 1967*, S. Rep. No. 91-403, 90th Cong., 1st Sess. 40 (1967).

[30] *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253, 255 (D. D.C. 1972); ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW, 1974 at 1077-1080. The Senate committee report on the Air Quality Act emphasized that the Act would apply to all areas of the country, and quoted Senator Muskie for the proposition that it was necessary "to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future." *Air Quality Act of 1967, supra* note 29, at 2-3, 8.

The Act was administered by the National Air Pollution Control Administration of the Department of Health, Education and Welfare, which formalized the concept of nondeterioration in its Guidelines for the Development of Air Quality Standards and Implementation Plans, Part I, § 1.51 at 7 (1969):

> "[A]n explicit purpose of the Act is "to *protect* and *enhance* the quality of the Nation's air resources" (emphasis added). Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air quality control region clearly would conflict with this expressed purpose of the law.

See generally, Non-Degradation—Clean Air Act and Amendments Held to Mandate a Policy Prohibiting Significant Deterioration of Air Quality in Areas of Relatively Clean Air, 2 FORDHAM URBAN L. J. 136 (1973) (hereinafter *Clean Air Act Held to Prohibit Significant Deterioration*); *The Clean Air Act and the Concept of Non-Degradation: Sierra Club v. Ruckelshaus*, 2 ECOLOGY L. Q. 801 (1971) (hereinafter *The Concept of Non-Degradation*).

the "protect and enhance" language of Section 101 mandated the policy of nondeterioration. HEW Secretary Robert H. Finch testified as follows in a statement presented by Undersecretary John Veneman:

> In their implementation plans, the States would have to spell out the measures to be taken to achieve and preserve national air quality standards. As I have indicated, they would have the option of designing their implementation plans to achieve or preserve higher than national quality levels, if they wished to do so.
>
> As you know, one of the express purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources" * * *. Accordingly, it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision. We shall continue to expect States to maintain air of good quality where it now exists.

Air Pollution—1970, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, Part I, 132-133 (1970). Undersecretary Veneman went on to state that "[i]t will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with the provisions of the Act. We do not intend to condone 'backsliding.' If an area has air quality which is better than the national standards, they would be required to stay there and not pollute the air ever further, even though they may be below national standards." *Id.* at 143.

The Senate committee report gave express recognition to the concept of nondeterioration, directing that

> [i]*n areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementa-*

> *tion plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality.* Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970) (emphasis added). Quite to the contrary, however, there was no particular significance ascribed to the "shall approve" language of the section which became Section 110(a)(2). *Id.* at 11-15.

The explanation of this omission in the legislative history appears to be that the 1970 amendments were aimed at states that refused to take action to improve their air quality. The background of the 1970 amendments was described in *Train v. NRDC*, *supra*, 421 U.S. at 64:

> The response of the States to these manifestations of increasing congressional concern with air pollution was disappointing. Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970 * * *.

The "stick" was the group of express requirements as to the content of state implementation plans.[31] The

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[31] "The Committee recognized that because the proposed bill would require a great deal in a short period of time and because the brevity of the provision in existing law has led to uneven and inadequate interpretation, the character of an implementation plan must be specified and the alternative methods of achievement listed. The Committee bill would require that a rigorous time sequence be met in the development of the implementation plan and would provide for the substitution of Secretarial authority if the State plan, or a portion thereof, is inadequate to attain the quality of ambient air established by the nationally promulgated ambient air quality standard." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 12 (1970).

"shall approve" language was addressed to the administrative problems that would be caused by a requirement that all states submit complying implementation plans within a limited time; the provisions of Section 110(a) are, more than anything else, a summary of the mandatory requirements for all state implementation plans.[32] We have, however, found no indication, nor have we been cited to any indication in the legislative history, that Section 110 was intended in any way to vitiate the nondeterioration mandate contained in the Senate report.[33]

This court has recently cautioned that a failure by Congress expressly to reject the administrative construction of an act need not, without more, indicate congressional acquiescence in the agency interpretation.[34] In

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[32] *See* note 31 *supra.*

[33] *See The Concept of Non-Degradation, supra* note 30, at 819:

> The legislative history does support the contention that the principle of non-degradation is implicit in the Clean Air Act. It resolves the vagueness of both the purpose clause and section 110. Although the history of the 1967 Act conveys an ambiguous picture of the legislative intent, the history of both the 1970 Amendments and the later Implementation Hearings clearly indicates that Congress confronted the complexities of air pollution control and undertook a program designed to prevent the deterioration of clean air.

[34] *Chisholm v. FCC,* —— U.S.App.D.C. ——, ——, —— F.2d ——, ——, slip op. at 26 (No. 75-1951, decided April 12, 1976):

> We begin by noting that attributing legal significance to Congressional inaction is a dangerous business * * *. The Supreme Court has said that Congressional failure to repudiate particular decisions "frequently betokens unawareness, preoccupation, or paralysis" rather than conscious choice, *Zuber v. Allen,* 396 U.S. 168, 185-86 n. 21 (1969), and "affords the most dubious foundation for drawing positive inferences," *United States v. Price,* 361 U.S. 304, 310-11 (1960) (Harlan, J.).

Chisholm v. FCC, —— U.S. App.D.C. ——, —— F.2d —— (No. 75-1951, decided April 12, 1976), the court refused to ascribe significance to congressional inaction when it appeared that Congress was "aware" of the administrative interpretation only "in a technical sense." —— U.S. App.D.C. at ——, —— F.2d at ——, slip op. at 27. We are not presented with that situation. Not only was the Agency's interpretation of the Air Quality Act of 1967 as mandating prevention of significant deterioration clearly before the Congress in 1970, but the committee reports contain express language that the principle of nondeterioration was preserved by the Clean Air Act Amendments of 1970.

This sort of express congressional recognition of the implementing agency's statutory construction can be extremely significant in interpreting legislative intent. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), for instance, the Court found approval of a long-standing administrative interpretation in Congress' studied inaction:

> In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.

416 U.S. at 274-275. The Court reached similar results in *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (administration of Passport Act of 1926); *C.I.R. v. Estate of Noel*, 380 U.S. 678, 682 (1965); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 114-225 (1939); and *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 313 (1933), among others.

In the instant case there is every indication that Congress intended in 1970 to continue a policy of prevention of significant deterioration of air quality. In addition, we find nothing in the legislative history to indicate that Congress had any desire or intention that the 1970 amendments hinder the fight against air pollution by voiding the principle of nondeterioration.

It is significant in this regard that recent congressional statements have supported the historic existence of a requirement of nondeterioration. The report of the House Committee on Interstate and Foreign Commerce on the proposed Clean Air Act Amendements of 1976 (H.R. Rep. No. 94-1175, May 15, 1976) endorses a new statutory definition of nondeterioration, commenting that "[t]he Committee has developed this section to provide clearer definition of the nearly decade-old policy (reflected in section 101(b) of the Act) that significant deterioration of clean air must be avoided, and to provide more specific congressional guidance as to how this policy is to be implemented." *Id.* at 83. A contemporaneous report of the Senate Committee on Public Works on similar proposed amendments has both restated the language quoted above from the 1970 Senate report [35] and reaffirmed the continuing policy of nondeterioration:

> A nondegradation policy was articulated first in Federal water pollution law. That was in 1965. The concept was incorporated into the 1967 Air Quality Act, which stated that a basic purpose of the Act was to "protect and enhance the quality of the Nation's air resources." That language was not altered by the 1970 Clean Air Amendments. This bill clarifies and details that policy.

Clean Air Amendments of 1976, S. Rep. No. 94-717 at 20 (March 29, 1976). It would fly in the face of overwhelming evidence of legislative intent to hold that the

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[35] *See* pp. 21-22 *supra*.

Clean Air Act does not contain a requirement of prevention of significant deterioration.

Our belief that *Sierra Club v. Ruckelshaus* was decided properly is bolstered by its acceptance in a number of other circuits.[36] Petitioners suggest, however, that the later decision in *Train v. NRDC*, 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are necessarily inconsistent with the concept of nondeterioration of air quality. We reject both contentions.

Train v. NRDC involved construction of the "shall approve" language of Section 110(a)(3)(A),[37] which requires that the Administrator approve revisions of state plans which, after revision, meet the criteria of Section 110(a)(2). The Court held that state action which grants a variance to an individual pollution source must be approved by the Administrator if the approval will not expand the time for compliance with national primary ambient air quality standards[38] or otherwise

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[36] *See NRDC v. EPA*, 489 F.2d 390, 408 (5th Cir. 1974), *rev'd on other grounds, sub nom. Train v. NRDC*, 421 U.S. 60 (1975); *Big Rivers Electric Corp. v. EPA*, 8 ERC 1092 (6th Cir. 1975); *Union Electric Co. v. EPA*, 515 F.2d 206, 220 (8th Cir. 1975), *aff'd on other grounds*, —— U.S. ——, 44 U.S. L. WEEK 5060 (June 25, 1976); *NRDC v. EPA*, 507 F.2d 905, 913 (9th Cir. 1974). *Cf. Highland Park v. Train*, 519 F.2d 681, 685 (7th Cir. 1975).

[37] "The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph 2 [§ 110(a)(2)] and has been adopted by the State after reasonable notice and public hearings." Section 110(a)(3)(A), 42 U.S.C. § 1857c-5(a)(3)(A) (Supp. IV 1974).

[38] Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A) (1970):

> The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

[continued]

violate the requirements of Section 110(a)(2). In the following passage, strongly pressed upon us by petitioners, the Court emphasized the mandatory language of Section 110(a)(2):

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.

421 U.S. at 79 (emphasis in original).[39] It is argued that this decision removes from the Administrator the dis-

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> (A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but * * * in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained[.]

[39] The language was repeated in *Hancock v. Train*, —— U.S. ——, ——, 44 U.S. L. WEEK 4767, 4768 (June 7, 1976) (dictum), which concerned the obligation of federal facilities

cretion to disapprove a plan which complies with Section 110(a)(2), and therefore requires that *Sierra Club v. Ruckleshaus* be overturned. This argument, however, is subject to the same analysis by which we reject the argument based on Section 110(a)(2) alone. Unlike the instant case, *Train* was concerned with air pollution below the national standards, and the question was whether individual variances would prevent the states from achieving the standards within the prescribed time limits. The Supreme Court in *Train* did not consider the issue of nondeterioration, even though the decision below was based in part on *Sierra Club v. Ruckleshaus.*[40] Rather than assume, as the industrial petitioners would have us, that *Train* silently overturned the earlier divided affirmance in *Sierra Club*, we find it more reasonable to conclude that the Court did not address the issue, and we reject the argument based on *Train.*

In another recent decision, *Union Electric Co. v. EPA*, —— U.S. ——, 44 U.S. L. WEEK 5060 (June 25, 1976), the Supreme Court found challenges to state implementation plans based on economic infeasibility to be barred by the mandatory nature of Section 110(a)(2). The Court found in the legislative history of the 1970 amendments a congressional determination that clean air objectives should take precedence over claims of economic or technological infeasibility:

> As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise unchecked problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the

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to comply with the requirements of state implementation plans.

[40] *NRDC v. EPA, supra* note 36, 489 F.2d at 408. The *Train* decision was limited expressly to the question of approval of variances. 421 U.S. at 69-70.

> States, but nonetheless subject * * * the States to strict minimum compliance requirements. These requirements are of a "technology-forcing character," *Train* v. *NRDC*, 421 U.S., at 91, and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.
>
> This approach is apparent on the face of § 110(a)(2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified, *Train* v. *NRDC*, 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological infeasibility.

—— U.S. at ——, 44 U.S. L. WEEK at 5063. Although the Court stressed the "shall approve" language of Section 110(a)(2), its construction was founded on a concern that the congressional mandate of prompt implementation of pollution control plans not be disserved. The Court was not presented with the distinct question whether the "shall approve" language of Section 110(a)(2) must be read to subvert the concomitant congressional directive that significant deteriation of air cleaner than the national standards be prevented.[41] Thus, despite the emphasis placed on (a)(2) by the opinions in *Train v. NRDC* and *Union Electric*, we do not believe the result in the instant case is controlled by either opinion.

Petitioners also rely on the Energy Supply and Environmental Coordination Act of 1974 (ESECA), which

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[41] As was the case in *Train v. NRDC*, the lower court in *Union Electric* expressly had approved the concept of prevention of significant deterioration. *Union Electric Co. v. EPA*, *supra* note 36, 515 F.2d at 220 n.39. The Supreme Court affirmed the Court of Appeals without mentioning that issue.

was enacted to encourage stationary fuel-burning sources to convert from oil to coal, to minimize the nation's dependence on imported oil. Among other things, it (1) authorized the Federal Energy Administration to require power plants and other major fuel-burning sources to burn coal, (2) amended the Clean Air Act to provide a limited exemption from stationary source requirements to those converting facilities,[42] and (3) required the Administrator of EPA to review the implementation plan of each state and notify any state which could revise its plan as to stationary fuel-burning sources without violating the national ambient air quality standards.[43] The ESECA is accommodated in the "significant deterioration" regulations by 40 C.F.R. § 52.21(d)(1), which exempts from preconstruction review modifications "to utilize an alternative fuel, or higher sulfur content fuel."

Although conversion to "dirtier" fuels such as coal certainly will impair both improvement and maintenance of air quality, there is no reason to believe that passage of ESECA was intended to eliminate the requirement of nondeterioration.[44] The amendment was a necessary response to the nationwide shortage of oil and natural gas,

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[42] Section 119, 42 U.S.C. § 1857c-10 (Supp. IV 1974).

[43] Section 110(a)(3)(B), 42 U.S.C. § 1857c-5(a)(3)(B) (Supp. IV 1974).

[44] The "purpose" section of ESECA, 15 U.S.C. § 791 Supp. IV 1974), is as follows:

> The purposes of this chapter are (1) to provide for a means to assist in meeting the essential needs of the United States for fuels, *in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment,* and (2) to provide requirements for reports respecting energy resources.

(Emphasis added.)

and no reason has been presented for ascribing to it a greater significance.[45]

We therefore find no substantial reason to question, under ESECA or *Train*, the continuing validity of *Sierra Club v. Ruckleshaus*, and we proceed to the substance of the regulations under review using that decision as our guide.

B. Are the regulations invalid on the ground that only two of the six primary air pollutants are considered?

The regulations provide for control only of particulate matter and sulfur dioxide emissions,[46] whereas the Administrator also has identified carbon monoxide, nitrogen oxides, hydrocarbons, and photochemical oxidents as air pollutants which have an adverse effect on public health or welfare.[47] It is contended that the regulations violate the District Court's order in *Sierra Club v. Ruckleshaus* by failing to prevent significant deterioration of air quality with respect to those four pollutants.[48]

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[45] We also reject the argument that it is "unfair" to count the increased emissions from a source that is converted to coal against the allowable pollution increment for the area, since that modification is exempted from preconstruction review. We see no reason why a state in which major utilities have been forced to convert to coal may not choose to impose commensurately stricter standards on the remainder of the area.

[46] *See* note 18 *supra*.

[47] 40 C.F.R. §§ 50.8-50.11 (1975).

[48] The order required that the Administrator "prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration." *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972).

EPA has responded that the interrelationships among those four pollutants, and the relationships between incremental increases in those pollutants and deterioration of air quality, are poorly understood and cannot be determined with any reasonable degree of accuracy:

> These [four pollutants] are commonly referred to as "automotive pollutants," because the automobile is the major source of each of them * * *. The first three (HC, NO_2, and O_x) are also known as "photochemical" or "reactive" pollutants, because under the influence of sunlight, they enter into a complex chemical reaction in the atmosphere. * * * The rate at which the reaction occurs depends on a number of variables, including temperature, humidity, solar intensity, and the concentrations of the input pullutants. * * *
>
> The chief reason for excluding photochemical pollutants from these regulations is that the relationship between the emission of HC and oxides of nitrogen, on the one hand, and the resulting ambient levels of the harmful pollutants O_x and NO_2, on the other, is very poorly understood. The only method for relating emissions to air quality for these pollutants is the "area-wide proportional model." This model assumes, as its name suggests, that ambient pollutant levels are proportional to total emissions. The model is useful only in areas where ambient pollutant levels are substantial and well-monitored, as in urban areas with smog problems. * * * But the proportional model cannot be used to regulate air quality deterioration in clean-air areas. This is because the assumptions underlying the model do not hold in clean-air areas, and also because it is not possible to make accurate measurements of ambient levels of photochemical pollutants that are substantially below the levels of the national standards.

Br. for respondent at 32-33 (footnote omitted), *elucidating*, 39 Fed. Reg. 31006 (August 27, 1974); 39 Fed.

Reg. 42511 (December 5, 1974); *Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality*, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (January 1975), at 21-27 (JA 117-123). EPA concluded that existing technology "is inappropriate for analyzing the incremental impact of individual new sources" with respect to the four "automotive pollutants," and that "[a]t this time, the only practical approach for dealing with these pollutants appears to be to minimize emissions as much as possible." 39 Fed. Reg. 42511 (December 5, 1974). EPA further has contended that ongoing programs toward reduction of automotive emissions "are adequate to prevent any significant deterioration due to sources of carbon monoxide, hydrocarbons or nitrogen oxides." [40]

Petitioners have emphasized that the four omitted pollutants can have extremely adverse effects on public health and welfare, and have noted that they are emitted by stationary sources as well as by moving vehicles. Petitioners have not, however, directly clashed with EPA's contention that it does not have technology or modeling techniques rationally to regulate emissions on a case-by-case basis. This is the type of policy decision in which the Agency's developed expertise is heavily implicated, and with which the court will not tamper so long as the decision was rational and based on consideration of the relevant factors. *Ethyl Corp. v. EPA*, *supra*, —— U.S. App.D.C. at ——-——, —— F.2d at ——-——, slip op. at 66-74. Given the absence of any direct denials of EPA's assertions on this point, the Agency is entitled to claim the presumption of validity which attends its actions. *Id.*, slip op. at 68. We therefore hold that EPA did not act unlawfully in excluding from its regulations the four "automotive pollutants."

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[40] 39 Fed. Reg. 31006 (Aug. 27, 1974).

C. Are Class II and Class III invalid as permitting significant deterioration of air quality?

D. Is it unlawful to make determinations as to permissible air quality deterioration on the basis of considerations other than air quality?

It is argued by Sierra Club that Classes II and III, by permitting increases in sulfur dioxide and particulate matter pollution to levels which in some areas may be many times present concentrations, allow significant deterioration of air quality. The "significance" is primarily a matter of the numbers involved; although evidence has been presented that levels of pollution below the national secondary standards may have adverse health effects,[50] it is for the Administrator rather than the courts to determine that the national secondary standards no longer can be said to protect the public from "any known or anticipated adverse effects" of a pollutant. The question of significance thus leads by implication to a second line of argument—that it is unlawful to consider deterioration of air quality "insignificant" simply because it accompanies normal, controlled economic development.

EPA recognized, in developing the concept of "significant deterioration" pursuant to Judge Pratt's order, that "[p]ending the development of adequate scientific data on the kind and extent of adverse effects of air pollutant levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare." 39 Fed. Reg. 18987 (July 16, 1973). It therefore determined that each state must

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[50] Br. for petitioners Sierra Club *et al.*, No. 74-2063, at 18-20. *See also Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

determine what level of incremental pollution, taking into account the air quality and social and economic needs and objectives of the area, would be "significant deterioration" of its air quality.[51]

In that context, it was a rational policy decision that the significance of deterioration of air quality should be determined by a qualitative balancing of clean air considerations against the competing demands of economic growth, population expansion, and development of alternative sources of energy. The approach provides a workable definition of significant deterioration which neither stifles necessary economic development nor permits unregulated deterioration to the national standards.[52] We therefore find that EPA acted within the discretion it is granted as to matters of policy [53] in choosing this design to prevent significant deterioration of air quality.

We may state our belief, as a general overview at this point, that for the most part it somewhat misses the mark to raise objections to the specific emission limits of the regulations under review. EPA has emphasized that the individual states are free to conceive and adopt their own methods of preventing significant deterioration. A state may use EPA's system to classify itself as industrial-metropolitan (Class III), as anticipating

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[51] *See* pp. 12-13 *supra*.

[52] EPA acknowledges that all states theoretically could reclassify to Class III, thereby permitting unregulated deterioration to the national standards. It asks that the states not "arbitrarily and capriciously" disregard its outlined considerations before redesignating areas. 40 C.F.R. § 52.21(c)(3)(vi)(*a*).

[53] "However formal the type of agency proceeding, an agency's policy choices are reviewed under the arbitrary and capricious standard, which asks merely whether the policy choice is rationally connected to its factual basis." *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L. J. 1750, 1751 (1975).

normal economic growth (II), or as desirous of protecting its clean air (I). But it also may develop its own scheme, based on its own needs, so long as the regulatory structure prevents significant deterioration of air cleaner than the national standards. Given the broad power vested in the states to alter or amend these regulations, we find little merit in objections to the specifics of the classification scheme itself.

E. Has the effective date of the regulations been postponed unlawfully beyond the date contemplated by the Clean Air Act?

The Clean Air Act of 1970 imposed a series of time limits for the various steps leading up to approval of state implementation plans. Under that timetable regulations should have become effective by the middle of 1972.[44]

The regulations employ two later effective dates. First, emissions increments are measured from a January 1, 1975 baseline, and all sources for which "approval" is given after that date will have their emissions counted against the allowable increment for the region. 40 C.F.R. § 52.21(d)(2)(i) (1975). Second, preconstruction review is provided only for sources which have "not

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[44] The Clean Air Act Amendments of 1970 were added on Dec. 31, 1970, 84 STAT. 1677. The Administrator was given 90 days in which to propose and promulgate national primary and secondary ambient air quality standards. Section 109(a)(1)(B), 42 U.S.C. § 1857c-4(a)(1)(B). The states then were given nine months to submit proposed implementation plans to the Administrator, § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1), and the Administrator had four months to approve or disapprove the plans. Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2). The Administrator was to "promptly prepare and publish" implementation plans for states which failed to submit a complying plan or which failed to revise a plan after 60 days notice. Section 110(c), 42 U.S.C. § 1857c-5(c). The target date for effectiveness of state implementation plans was therefore mid-1972.

commenced construction or modification prior to June 1, 1975." 40 C.F.R. § 52.21(d)(1) (1975). "'Commenced' means that an owner or operator has understaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification." 40 C.F.R. § 52.21(b)(7) (1975). *Compare* 40 C.F.R. § 52.01(b) (1975). All later-commenced source construction must be reviewed for compliance with new source performance standards and for a determination that construction will not cause the pollution increments of any area to be violated. 40 C.F.R. § 52.21(d)(2) (1975), *as amended*, 40 Fed. Reg. 42011 (September 10, 1975).

We are asked to hold that sources for which construction was commenced after mid-1972 must be counted against the allowable pollution increments for the various regions. EPA answers that inclusion of the earlier construction would limit practical use of the regulations to regulate future development. We accept the latter position. Whatever the effect of past construction has been upon present pollution, each state must determine what will be appropriate for future air quality and economic development. So long as any state may choose to limit future development to compensate for excessive past pollution, the choice of starting dates for the applicability of the regulations appears to be irrelevant.[55] For the same reason we do not believe EPA acted unreasonably in failing to count increases in pollution since 1972 against the allowable increments. It was a rational policy

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[55] Similarly, we find no ground for objection to the manner in which EPA has defined commencement of construction. 40 C.F.R. § 52.21(b)(7) (1975). Even if a source on which construction has "commenced" is not subject to preconstruction review, its emissions may be considered in choosing the appropriate pollution increment to be applied to the area.

decision to limit the instant regulations to prospective concerns only.

F. Is it arbitrary and capricious to review proposed construction of stationary sources on the basis of compliance with the New Source Performance Standards, rather than on the basis of Best Available Control Technology on a case-by-case basis?

G. Was the Administrator required to provide for preconstruction review of all sources, rather than for "significant" sources only?

40 C.F.R. § 52.21(d)(ii) (1975) requires that new sources which are subject to preconstruction review meet the level of emissions that would be achieved by application of the Best Available Control Technology (BACT); Section 52.01(f) defines BACT as equivalent to the New Source Performance Standards (NSPS) promulgated under Section 111 of the Clean Air Act, 42 U.S.C. § 1857c-6 (1970), *amended* (Supp. IV 1974), when those standards are available. If no NSPS has been established for a category of sources, preconstruction review of emission reduction systems is done on a case-by-case basis. 40 C.F.R. §§ 52.21(d)(2)(ii), 52.01(f) (1975). The Sierra Club posits that the NSPS guidelines, defined by Section 111 as "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated," are a "lowest common denominator"-based group and are inconsistent with the policy of nondeterioration.

We accept EPA's response that case-by-case review of all new sources would not only be unworkable, but would undermine Section 111 by limiting its application of NSPS to those areas which have not yet achieved the national secondary standards. It appears, in addition, that application of NSPS rather than BACT will not of

necessity lead to more total pollution; a given area still is limited to the specified increment for its classification, and the use of a less effective emission reduction system by one new statutory source will simply use up more of the allowable increment and limit opportunities for other proposed new sources. This trade-off, between types of control systems and opportunities for new source construction, is best left to the states, which by delegation will administer the preconstruction review. As the Supreme Court held in *Train v. NRDC*, *supra*, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." 421 U.S. at 79. We therefore hold that the use of NSPS is rational and in accord with the Clean Air Act.

An additional challenge to the procedures for preconstruction review is based on the allegedly unlawful limitation of review to 19 specified categories of sources.[56]

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[56] The 19 listed categories are:

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.
(ii) Coal Cleaning Plants.
(iii) Kraft Pulp Mills.
(iv) Portland Cement Plants.
(v) Primary Zinc Smelters.
(vi) Iron and Steel Mills.
(vii) Primary Aluminum Ore Reduction Plants.
(viii) Primary Copper Smelters.
(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.
(x) Sulfuric Acid Plants.
(xi) Petroleum Refineries.
(xii) Lime Plants.
(xiii) Phosphate Rock Processing Plants.
(xiv) By-Product Coke Oven Batteries.
(xv) Sulfur Recovery Plants.
(xvi) Carbon Black Plants (furnace process).

[continued]

We find this argument subject to the analysis presented above with respect to use of NSPS rather than BACT. Review of every new source of pollution clearly would be impossible since every gas- or oil-heated house is a source of some pollution. The decision to review only those sources which emit more than 25 pounds per hour of sulfur dioxide or particulate matter [57] does not mean there will of necessity be more total pollution; it means only that a large number of minor sources could use up the area's allowable increment and thereby preclude construction of new major sources of pollution. As EPA stated in a document explaining its regulations:

> The 18 categories which are covered by the regulation, except for fuel conversion plants, are the largest present emitters of SO_2 and TSP on a nationwide basis. Fuel conversion plants (coal gasifi-

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(xvii) Primary Lead Smelters.
(xviii) Fuel Conversion Plants.
(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

40 C.F.R. § 52.21(d)(1)(i)-(xix) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

[57] The standard of 25 pounds/hour of emissions for addition of new categories to the list of those subject to preconstruction review was proposed on June 9, 1975 (40 Fed. Reg. 24534) and adopted Sept. 10, 1975 (40 Fed. Reg. 42011):

> [T]he criteria the Administrator intends to use in adding further sources in the future * * * are:
>
> (1) a new source performance standard for sulfur dioxide (SO_2) or particulate matter has been established for the source or any facility of the source under Part 60 of this chapter, and (2) the established new source performance standard will allow any anticipated future plant affected by the standard to emit SO_2 or particulate matter in excess of 25 pounds per hour from the affected facility or facilities when operating at maximum design capacity.

The later notice also added the 19th category, Ferroalloy production facilities.

> cation and liquefication, oil shale processing, etc.) were included due to their significant growth potential, particularly in presently clean areas * * *. The air quality impact of sources not included in the 18 categories is taken into account since the total air quality deterioration above the baseline is taken into account when an application to construct a new source of one of the 18 categories is reviewed.

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U.S. Environmental Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 27-28. Further, it is within the power of the various states to enact more stringent controls, and expanded preconstruction review procedures, should limited review lead to problems in regulating incremental pollution. We therefore hold that the regulations are not invalid insofar as provision is made for preconstruction review of only the specified categories of stationary sources.

H. Are the regulations arbitrary and capricious on the ground that the allowable increments are unrelated to anticipated adverse effects on public health and welfare?

The regulations under review establish a classification scheme which is not based on demonstrated adverse air quality effects, but rather on a balancing of concerns with air quality, economic and social needs and objectives, and development of energy sources. The industrial petitioners contend that EPA is not authorized to promulgate regulations which are not related to adverse air quality effects, and that Classes I and II therefore are invalid.

The need to prevent significant deterioration of air cleaner than the national standards, and the statutory authorization therefor, was settled by the *Sierra Club v. Ruckelshaus* litigation. It clearly is a rational legislative purpose to protect and enhance the quality of the

nation's air, even in the absence of quantified evidence of adverse effects.[48]

The District Court order in *Sierra Club v. Ruckelshaus* mandated that EPA enforce this legislative purpose by preventing significant deterioration of air quality, but left definition of "significant" to the Agency. EPA's solution was a definition created by its own implementation; each state's evaluation of the relative importance

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[48] EPA emphasized in promulgating regulations that levels of pollution below the national standards still may have some adverse effects:

> Limitations on air quality that result in cleaner air than the national ambient air quality standards cannot * * * be based on any quantitative measure of harm to either public health or welfare. This is not, however, to say that there are no possible unquantified adverse effects on public health or welfare below the levels of the national standards. Examples of such unquantified effects involve the transformation of sulfur dioxide into suspended sulfates and sulfuric acid aerosols, resulting in possible effects on health, visibility, climatic changes, acidity of rain, and deterioration of materials.
>
> Since there is no way to relate "significance" of deterioration of air quality to any adverse effects resulting from air quality levels cleaner than the national standards, EPA concluded that the determination of what is "significant" deterioration must take into account factors other than air quality alone. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air."

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U.S. Environmental Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 6. *See also Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

of the competing interests which surround continued maintenance of air quality will determine what level of deterioration would be significant for that state. The three classifications thus are not intended to represent a scientific conclusion as to what constitutes significant deterioration; rather, they are suggested frameworks for use by the states after independent evaluation. Because the regulations do not purport to be mandatory requirements based on scientific research, they properly cannot be judged by asking whether the increments are related to demonstrated health effects. As we have noted above, any state could adopt even more stringent regulations by proposing its own revision to its implementation plan.[89]

We therefore find insubstantial the objection that the varying allowable increments presented in the instant regulations are unrelated to demonstrated adverse health effects. The regulations flow from a valid legislative goal, and we believe EPA has acted reasonably in permitting each state, in its informed discretion, to develop a workable definition of significant deterioration.

I. Are the regulations unworkable because present modeling techniques are inadequate to predict precisely how a new source will affect the ambient air?

Some petitioners[90] have objected that present computer modeling technology is inadequate to predict with precision what effect a proposed new source will have on the ambient air, and therefore on the allowable increment for a given region. EPA does not dispute the point as to the accuracy of existing techniques, but does argue that present diffusion modeling techniques, "while not corresponding to actual conditions in the ambient air,

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[89] *See* pp. 16-17 *supra*.

[90] *See, e.g.*, br. of American Petroleum Institute *et al.* in No. 75-1665 at 38.

do provide a consistent and reproducible guide which can be used in comparing the relative impact of a source." 39 Fed. Reg. 31003 (August 27, 1974). So long as the method of measurement is consistent, it may be used as a reliable benchmark of the relative impact of different sources; EPA argues that it therefore is unnecessary to be able to guarantee with precision what effect a source will have.

We have no basis on which to question EPA's judgment as to its predictive techniques. Any consistent method of prediction can be adjusted in light of actual experience, and a state therefore may adjust its guidelines for future development on the basis of changes in the measured pollution levels over time. We cannot hold at this time, therefore, that lack of precision alone is a substantial objection to the methods which may be used to estimate the impact of a proposed source on actual levels of pollution.

J. Did EPA violate the Clean Air Act

(1) by not permitting submission of revised plans before promulgating regulations, or

(2) by not holding hearings in each state before promulgating the regulations?

The Administrator is required to prepare and publish his own implementation plan, or portion thereof, for a state if (a) the state fails to submit a plan as to any national standard, (b) the plan is not in accordance with the requirements of Section 110 of the Act, or (c) the state fails, within 60 days, to revise its plan pursuant to Section 110(a)(2)(H), which requires that implementation plans provide for revisions (i) to take account of changes in technology or (ii) if the Administrator determines that the plan is inadequate to achieve the primary or secondary standards. Section 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection

(c) (1) also contains a hearing requirement; if a state did not hold a public hearing with respect to the plan or revision being promulgated, the Administrator must provide a hearing within the state. The Administrator is to promulgate his regulations within six months, unless within that time the state has adopted and submitted an implementation plan which is in accord with the requirements of Section 110. *Id.*

It is contended that the instant regulations, which amended the implementation plans of all states,[61] constituted a "revision" under Section 110(a) (2) (H). Under Section 110(c) (1) (C) the Administrator may promulgate new regulations only if a state fails, after 60 days, to submit the required (a) (2) (H) revision. Further, if the regulations are considered "revisions," it is claimed, the Administrator was required by Section 110 (c) (1) to hold a hearing in each state before promulgating the regulations.

The original order of the District Court required that the "Administrator * * * prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration. Such regulations shall be promulgated within six months of this order." *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972). That order —which was affirmed by this court and the Supreme Court—clearly did not contemplate that a hearing be held in each state prior to promulgation of regulations, nor did it require that the states be given a prior opportunity to revise their plans. We reaffirm the order in both respects.

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[61] *See* note 9 *supra*.

All states had held public hearings on their proposed implementation plans before the District Court order was entered.[62] After disapproving all state plans insofar as they failed to prevent significant deterioration,[63] the Administrator held five regional hearings in Washington, Atlanta, Dallas, Denver, and San Francisco on proposed regulations,[64] and solicited written comments.[65] We believe that procedure was sufficient in the circumstances presented. Unfortunately, the requirement of prevention of significant deterioration does not fit neatly into the statutory scheme, as it is not expressly included in Section 110 of the Act. The Administrator's disapproval of all plans pursuant to the District Court order, and the subsequent promulgation of regulations, were required by Section 101 of the Act and by the legislative history, but were not within the defined processes of Section 110(c). Implementation of the District Court order required an excercise of discretion by the Administrator, and we find that he acted well within that discretion by concluding that only regional hearings were necessary to supplement the hearings which had already been held in all states.

In making this decision we wish to emphasize, first, that petitioners have not alleged with any specificity how they were harmed by the lack of individual state hearings. We are presented only with a generalized statutory claim,[66] which apparently never was raised before the

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[62] In its initial approval and disapproval of state plans, published May 31, 1972 (37 Fed. Reg. 10842), EPA noted that all states had held hearings and had submitted implementation plans.

[63] 37 Fed. Reg. 23836 (Nov. 9, 1972).

[64] *See* 39 Fed. Reg. 31000 (Aug. 27, 1974).

[65] *Id.*

[66] *Cf. American Airlines, Inc. v. CAB*, 123 U.S.App.D.C. 310 318-319, 359 F.2d 624, 632-633, *cert. denied*, 385 U.S. 843 (1966):

[Continued]

Agency. Second, it should be remembered that the states arguably have been denied no rights by promulgation of the nondeterioration regulations. They remain free, after public hearing, to develop their own regulatory scheme to supplant that promulgated by EPA, so long as the substitute prevents significant deterioration of air quality.[67] We cannot conclude, then, that the regulations are defective on procedural grounds.

K. By providing for reclassification of federal and Indian lands independent of state action, do the regulations abrogate authority granted to the states by the Clean Air Act?

Federal land managers and Indian governing bodies are authorized to propose redesignation of their lands, after consultation with officials of other affected areas and compliance with procedural and hearing requirements. 40 C.F.R. § 52.21(c)(3) (1975).[68] The industrial petitioners and the petitioning state governments object that this authority violates the delegation to the states of authority over air quality within their bound-

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> [T]here is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay. Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kind of facts they proposed to adduce, and by what witnesses, etc. * * *

See also United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952).

[67] *See* pp. 16-17 *supra*.

[68] *See* pp. 13-14 *supra*.

aries in Section 101(a)(3), 42 U.S.C. § 1857(a)(3),[69] and Section 107(a), 42 U.S.C. § 1857c-2(a),[70] that it contradicts the submission of federal facilities to state regulation in Section 118, 42 U.S.C. § 1857f,[71] and that the authority to redesignate gives these lands tremendous practical power over neighboring areas which might be hindered in their development because of designation of federal or Indian lands as Class I areas.[72]

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[69] 42 U.S.C. § 1857(a)(3) (1970):

(a) The Congress finds—

* * * *

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments[.]

[70] 42 U.S.C. § 1857c-2(a) (1970):

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

[71] 42 U.S.C. § 1857f (1970):

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so * * *. * * *

[72] *See* 39 Fed. Reg. 42512 (Dec. 5, 1974):

Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air

EPA has responded that federal land managers and Indian governing bodies have an important legal interest in protecting the air quality of their lands, that redesignation may not be proposed without consultation with officials of the affected states,[73] and that the Administrator may disapprove redesignation if arbitrary and capricious disregard of the interests of other affected areas is demonstrated.[74] With regard to submission of federal facilities to state regulation, EPA notes that federal lands may be redesignated only to a more restrictive classification than that applicable to the entire state,[75] and thus cannot contribute to unwanted deterioration of air quality.

We pretermit this question, as we find that the issue is not yet ripe for review.[76] No federal or Indian land

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quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends [*sic*] well beyond the Class I boundaries into the adjacent area. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

[73] 40 C.F.R. § 52.21(c)(3)(iv), (v) (1975).

[74] 40 C.F.R. § 52.21(c)(3)(vi)(*b*), (*c*) (1975).

[75] 40 C.F.R. § 52.21(c)(3)(iv) (1975).

[76] *See Toilet Goods Ass'n Inc. v. Gardner*, 387 U.S. 158 (1967), in which cosmetic manufacturers had brought a pre-

has yet been redesignated, and to that extent we cannot be certain how a conflict may evolve. If the Administrator were to approve, as replacements for these regulations, individual state plans which did not include the powers granted to federal land managers and Indian governing bodies, the problems foreseen by petitioners might never arise.

We note that reservation of power to federal land managers and Indians governing bodies should have no

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enforcement action to challenge the authority of the Commissioner of Food and Drugs to issue regulations under the Color Additive Amendments to the Federal Food, Drug, and Cosmetic Act. The regulation at issue authorized the Commissioner to suspend certification service to any person who denied the FDA free access to manufacturing information. Although the issue was purely legal, the Court found that, as framed, it was not appropriate for judicial resolution:

> The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order. The statutory authority asserted for the regulation is the power to promulgate regulations "for the efficient enforcement" of the Act, § 701(a). Whether the regulation is justified thus depends not only, as petitioners appear to suggest, on whether Congress refused to include a specific section of the Act authorizing such inspections, although this factor is sure to be a highly relevant one, but also on whether the statutory scheme as a whole justified promulgation of the regulation. * * * This will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets * * *. We believe that judicial appraisal of these factors is likely to stand on

effect on present conduct; there appears to be no reason why economic development of any area should be hindered by the possibility that a nearby area may be redesignated in the future to a more restrictive classification. We therefore do not foresee any irreparable injury which may arise from deferral of this question until it arises in a more concrete context.

L. Are the regulations constitutional?

We find the arguments challenging the constitutionality of the nondeterioration regulations to be insubstantial. Regulation of air pollution clearly is within the power of the federal government under the commerce clause,[77] and we can see no basis on which to distinguish deterioration of air cleaner than national standards from pollution in other contexts.[78] Nor do we agree that the regulations bear no rational relationship to protection of public health and welfare and therefore violate the due process clause of the Fifth Amendment. There is a rational relationship between air quality deterioration and the public health and welfare,[79] and there is a proper legislative purpose[80] in prevention of significant

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a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.

387 U.S. at 163-164 (emphasis in original).

[77] *See District of Columbia v. Train*, 172 U.S.App.D.C. 311, 328, 521 F.2d 971, 988 (1975); *Pennsylvania v. EPA*, 500 F.2d 246, 259 (3d Cir. 1974); *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974).

[78] Indeed, the vigorous objections that have been mounted against redesignation of federal lands or Indian lands are based on recognition that a pollution source can have air quality effects over a large area.

[79] *See* note 58 *supra*.

[80] *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-259 (1964), in which the Court held the Civil

deterioration of air quality. Neither can the regulations be construed as an unconstitutional "taking" under the Fifth Amendment, any more than existing emission control regulations represent such a "taking." [81] The use of private land certainly is limited, but the limitation is not so extreme as to represent an appropriation of the land.

The Tenth Amendment is not implicated either by infringement on the reserved powers of the states, *cf. National League of Cities v. Usery*, —— U.S. ——, 44 U.S. L. WEEK 4974 (June 24, 1976), or by any requirement of affirmative action, as in *District of Columbia v. Train*, 172 U.S.App.D.C. 311, 521 F.2d 971 (1975). The states retain broad discretion under the regulations to control the use of their land and the scope of their economic development, and are required to take no af-

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Rights Act of 1964 to be a valid exercise of congressional power under the commerce clause, and found the Act not barred by the Fifth Amendment:

> Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. * * *

See also Nebbia v. New York, 291 U.S. 502, 537 (1934) (Fourteenth Amendment).

[81] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 678 (1st Cir. 1974), in which the court upheld a transportation control plan which mandated a 40% reduction in available off-street parking spaces:

> [T]he Government has not taken title to the spaces, and the decision about alternative uses of the space has been left to the owner. The takings clause is ordinarily not offended by regulation of uses, even though the regulation may severely or even drastically affect the value of

firmative action. Preconstruction review under the regulations is conducted by the Administrator unless a state requests that responsibility be delegated to it. 40 C.F.R. § 52.21(d), (f) (1975).

Last, we find no merit to the argument that the congressional delegation of authority to EPA is unconstitutionally vague. There is substantial basis for the instant regulations in both the Clean Air Act and its legislative history, and we find the regulations to be a reasonable means of implementing the congressional intent.[82] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 676-677 (1st Cir. 1974).

VI. Conclusion

We find no ground on which to disturb the regulations under review, and we therefore affirm the EPA "Prevention of Significant Air Quality Deterioration"

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the land or real property. If the highest-valued use of the property is forbidden by regulations of general applicability, no taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner.
* * *

[82] In *Lichter v. United States*, 334 U.S. 742, 785 (1947), the Court upheld a congressional grant of authority to the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission to renegotiate contracts and to recover "excessive profits." The Court applied the following reasoning to the claim that the term "excessive profits" was unconstitutionally vague:

> It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. "If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power." *Hampton Co.* v. *United States*, 276 U.S. 394, 409. Standards prescribed by Congress are to be read in the light of the conditions to which they are

regulations.[83] Our review of *Sierra Club v. Ruckelshaus* and subsequent events has revealed no substantial reason for rejection of that decision, and we hold that the non-deterioration regulations promulgated pursuant to that decision are both rational and in accordance with law.

Affirmed.

Circuit Judge WILKEY concurs in the result only.

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to be applied. "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 104. • • •

[83] As noted above, *see* pp. 49-51, we do not decide the question whether reclassification of federal and Indian lands independent of state action may be unlawful.

APPENDIX B

Relevant Provisions of the United States Constitution

UNITED STATES CONSTITUTION

Article I

Section 1:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX C

Relevant Provisions of the Clean Air Act

RELEVANT PROVISIONS OF THE CLEAN AIR ACT

42 U.S.C. § 1857

Findings And Purposes

Sec. 101(a) The Congress finds

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

42 U.S.C. § 1857c-2

Air Quality Control Regions

Sec. 107. (a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality region in such State.

(b) For purposese of developing and carrying out implementation plans under section 110—

(1) an air quality control region designated under this section before the date of enactment of the Clean Air Amendments of 1970, or a region designated after such date under subsection (c), shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, after consultation with appropriate State and local author-

ities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the governors of the affected States of any designation made under this subsection.

42 U.S.C. § 1857c-3

Air Quality Criteria And Control Techniques

Sec. 108. (a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an

air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) (1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the technology and costs of emission control. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1), which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit as appropriate, to the Administrator information related to that required by paragraph (1).

(c) The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section.

(d) The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

42 U.S.C. § 1857c-4

National Ambient Air Quality Standards

Sec. 109. (a) (1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modification as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

42 U.S.C. § 1857c-5

Implementation Plans

Sec. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary

standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator

finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

[PL 93-319, June 24, 1974]

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority

to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2) (A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking

surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a

permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

[PL 93-319, June 24, 1974]

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e) (1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Admiinstrator determines that—

(A) one or more emission sources (or classes of moving

sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f) (1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirements before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other

alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare, then the Administrator shall grant a postponement of such requirement.

(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearings, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307(a) (relating to subpoenas) shall be applicable to any proceeding under this subsection.

42 U.S.C. § 1857c-6

Standards Of Performance For New Stationary Sources

Sec. 111. (a) For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who

owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purposes of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories

of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such sandards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

42 U.S.C. § 1857d-1

Retention Of State Authority

Sec. 116. Except as otherwise provided in sections 119(c), (e) and (f), 209.211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

[PL 93-319, June 24, 1974]

42 U.S.C. § 1857h-5(b)(1)

General Provision Relating To Administrative Proceedings And Judicial Review

Sec. 307

(b) (1) A petition for review of action of the Administrator in promulgating any national primary or secondary

ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202 (b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

[PL 93-319, June 24, 1974]

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

APPENDIX D

EPA Regulations Entitled
"Prevention of Significant Air Quality Deterioration,"
40 C.F.R. §§ 52.01(d) and (f), 52.21

Title 40—Protection Of Environment

Chapter I—Environmental Protection Agency

Subchapter C—Air Programs

Part 52—Approval And Promulgation Of Implementation Plans

Subpart A—General Provisions;

Subpart EEE; and Appendices

§ 52.01 Definitions.

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this Part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

[39 FR 33512, September 18, 1974; 39 FR 42510, December 5, 1974]

(f) The term "best available control technology," as applied to any affected facility subject to Part 60 of this chapter, means any emission control device or technique which is capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60 of this chapter. Where no standard of performance has been proposed or promulgated for a source or portion thereof under Part 60, best available control technology shall be determined on a case-by-case basis considering the following:

(1) the process, fuels, and raw material available and to be employed in the facility involved,

(2) The engineering aspects of the application of various types of control techniques which have been adequately demonstrated,

(3) Process and fuel changes,

(4) The respective costs of the application of all such control techniques, process changes, alternative fuels, etc.,

(5) Any applicable State and local emission limitations, and

(6) Locational and siting considerations.

[39 FR 42510, December 5, 1974]

§ 52.21 Significant deterioration of air quality.

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Specific disap-

provals are listed, where applicable, in Subparts B through DDD of this part. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portion of plans approved or promulgated under this part.

(b) *Definitions.* For the purpose of this section:

(1) "Facility" means an identifiable piece of process equipment. A stationary source is composed of one or more pollutant-emitting facilities.

[40 FR 25004, June 12, 1975]

(2) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(3) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands.

(4) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(5) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(6) "Construction" means fabrication, erection or installation of a stationary source.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a

contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. The provisions of this paragraph do not apply in those counties or other functionally equivalent areas that pervasively exceeded any national ambient air quality standards during 1974 for sulfur dioxide or particulate matter and then only with respect to such pollutants. States may notify the Administrator at any time of those areas which exceeded the national standards during 1974 and therefore are exempt from the requirements of this paragraph.

(2) (i) For purposes of this paragraph, areas designated as Class I or II shall be limited to the following increases in pollutant concentration occurring since January 1, 1975:

[40 FR 25004, June 12, 1975]

Area designations

Pollutant	Class I ug/m³	Class II ug/m³
Particulate matter:		
Annual geometric mean	5	10
24-hr maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr maximum	5	100
3-hr maximum	25	700

[40 FR 2802, January 16, 1975]

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(iii) The air quality impact of sources granted approval to construct or modify prior to January 1, 1975 (pursuant to the approved new source review procedures in the plan) but not yet operating prior to January 1, 1975, shall not be counted against the air quality increments specified in paragraph (c) (2) (i) of this section.

[40 FR 25004, June 12, 1975]

(3) (i) All areas are designated Class II as of the effective date of this paragraph. Redesignation may be proposed by the respective States, Federal Land Managers, or Indian Governing Bodies, as provided below, subject to approval by the Administrator.

(ii) The State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

(*a*) At least one public hearing in held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(*b*) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation are notified at least 30 days prior to the public hearing, and

[40 FR 25004, June 12, 1975]

(*c*) A discussion of the reasons for the proposed redesignation is available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contains appropriate notification of the availability of such discussion, and

(*d*) The proposed redesignation is based on the record of the State's hearing, which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.

(*e*) The redesignation is proposed after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation.

[40 FR 25004, June 12, 1975]

(iii) Except as provided in subdivision (iv) of this subparagraph, a State in which lands owned by the Federal Government are located may submit to the Administrator a proposal to redesignate such lands Class I, Class II, or Class III in accordance with subdivision (ii) of the subparagraph provided that:

(*a*) The redesignation is consistent with adjacent State and privately owned land, and

(*b*) Such redesignation is proposed after consultation with the Federal Land Manager.

(iv) Notwithstanding subdivision (iii) of this subparagraph, the Federal Land Manager may submit to the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable provided that:

(*a*) The Federal Land Manager follows procedures equivalent to those required of States under paragraph (c)(3)(ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Federal Land is located or which border the Federal land.

(v) Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws. Where a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

(*a*) The Indian Governing Body follows procedures equivalent to those required of States under paragraph (c)(3)(ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.

(vi) The Administrator shall approve within 90 days, any redesignation proposed pursuant to this subparagraph as follows:

(*a*) Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (1) that the requirements of subdivisions (ii) and (iii) of this subparagraph have not been complied with, (2) that the state has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph, or (3) that the State has not requested and received delegation of

responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

[40 FR 25004, June 12, 1975]

(*b*) Any redesignation proposed pursuant to subdivision (iv) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (iv) of this subparagraph have not been complied with, or (*2*) that the Federal Land Manager has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3) (ii) (*d*) of this paragraph.

(*c*) Any redesignation submitted pursuant to subdivision (v) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (v) of this subparagraph have not been complied with, or (*2*) that the Indian Governing Body has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3) (ii) (*d*) of this paragraph.

(*d*) Any redesignation proposed pursuant to this paragraph shall be approved only after the Administrator has solicited written comments from affected Federal agencies and Indian Governing Bodies and from the public on the proposal.

(*e*) Any proposed redesignation protested to the proposing State, Indian Governing Body, or Federal Land Manager and to the Administrator by another State or Indian Governing Body because of the effects upon such protesting State or Indian Reservation shall be approved by the Administrator only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and

upon other areas and States; and any impacts upon regional or national interests.

(*f*) The requirements of paragraph (e)(3)(vi)(*a*)(3) that a State request and receive delegation of the new source review requirements of this section as a condition to approval of a proposed redesignation, shall include as a minimum receiving the administrative and technical functions of the new source review. The Administrator will carry out any required enforcement action in cases where the State does not have adequate legal authority to initiate such actions. The Administrator may waive the requirements of paragraph (c)(3)(vi)(*a*)(3) if the State Attorney-General has determined that the State cannot accept delegation of the administrative/technical functions.

[40 FR 25004, June 12, 1975]

(vii) If the Administrator disapproves any proposed area designation under this subparagraph, the State, Federal Land Manager or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator or reconsidering any area designation determined by the Administrator to be arbitrary and capricious.

(d) *Review of new sources.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the requirements of this paragraph apply to any new or modified stationary source of the type identified below which has not commenced construction or modification prior to June 1, 1975, except as specifically provided below. A source which is modified, but does not increase the amount of sulfur oxides or particulate

matter emitted, or is modified to utilize an alternative fuel, or higher sulfur content fuel, shall not be subject to this paragraph.

[40 FR 25004, June 12, 1975]

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.

(ii) Coal Cleaning Plants.

(iii) Kraft Pulp Mills.

(iv) Portland Cement Plants.

(v) Primary Zinc Smelters.

(vi) Iron and Steel Mills.

(vii) Primary Aluminum Ore Reduction Plants.

(viii) Primary Copper Smelters.

(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.

(x) Sulfuric Acid Plants.

(xi) Petroleum Refineries.

(xii) Lime Plants.

(xiii) Phosphate Rock Processing Plants.

(xiv) By-Product Coke Oven Batteries.

(xv) Sulfur Recovery Plants.

(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.

(xviii) Fuel Conversion Plants.

(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

[40 FR 42010, September 10, 1975]

(2) No owner or operator shall commence construction or modification of a source subject to this paragraph unless the Administrator determines that, on the basis of information submitted pursuant to subparagraph (3) of this paragraph:

(i) The effect on air quality concentration of the source or modified source, in conjunction with the effects of growth and reduction in emissions after January 1, 1975, of other sources in the area affected by the proposed source, will not violate the air quality increments applicable in the area where the source will be located nor the air quality increments applicable in any other areas. The analysis of emissions growth and reduction after January 1, 1975, or other sources in the areas affected by the proposed source shall include all new and modified sources granted approval to construct pursuant to this paragraph; reduction in emissions from existing sources which contributed to air quality during all or part of 1974; and general commercial, residential, industrial, and other sources of emissions growth not exempted by paragraph (c)(2)(iii) of this section which has occurred since January 1, 1975.

[40 FR 25004, June 12, 1975]

(ii) The new or modified source will meet an emission limit, to be specified by the Administrator as a condition to approval, which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

(iii) With respect to modified sources, the requirements of subparagraph (2)(ii) of this paragraph shall be applicable only to the facility or facilities from which emissions are increased.

(3) In making the determinations required by paragraph (d)(2) of this section, the Administrator shall, as a minimum, require the owner or operator of the source subject to this paragraph to submit: site information; plans, description, specifications, and drawings showing the design of the source; information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels; and any other information necessary to determine that best available control technology will be applied. Upon request of the Administrator, the owner or operator of the source shall also provide information on the nature and extent of general commercial, residential, industrial, and other growth which has occurred in the area affected by the source's emissions (such area to be specified by the Administrator) since January 1, 1975.

[40 FR 25004, June 12, 1975]

(4)(i) Where a new or modified source is located on Federal lands, such source shall be subject to the procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be in addition to applicable procedures conducted by the Federal Land Manager for administration and protection of the affected Federal Lands. Where feasible, the Administrator will coordinate his review and hearings with the Federal Land Manager to avoid duplicate administrative procedures.

(ii) New or modified sources which are located on Indian Reservations shall be subject to procedures set forth in para-

graphs (d) and (e) of this section. Such procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior with respect to lands over which the State has not assumed jurisdiction under other laws.

(iii) Whenever any new or modified source is subject to action by a Federal Agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad environmental reviews under that Act, to the maximum extent feasible and reasonable.

[40 FR 25004, June 12, 1975]

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

(e) *Procedures for public participation.* (1) (i) Within 20 days after receipt of an application to construct, or any addition to such application, the Administrator shall advise the owner or operator of any deficiency in the information submitted in support of the application. In the event of such a deficiency, the date of receipt of the application for the purpose of paragraph (e)(1)(ii) of this section shall be the date on which all required information is received by the Administrator.

(ii) Within 30 days after receipt of a complete application, the Administrator shall:

(*a*) Make a preliminary determination whether the source should be approved, approved with conditions, or disapproved.

(*b*) Make available in at least one location in each region in which the proposed source would be constructed, a copy of all material submitted by the owner or operator, a copy of the Administrator's preliminary determination and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

(*c*) Notify the public, by prominent advertisement in newspaper of general circulation in each region in which the proposed source would be constructed of the opportunity for written public comment on the information submitted by the owner or operator and the Administrator's preliminary determination on the approvability of the source.

(iii) A copy of the notice required pursuant to this subparagraph shall be sent to the applicant and to officials and agencies having cognizance over the locations where the source will be situated as follows: State and local air pollution control agencies, the chief executive of the city and county; any comprehensive regional land use planning agency; and any State, Federal Land Manager or Indian Governing Body whose lands will be significantly affected by the source's emissions.

(iv) Public comments submitted in writing within 30 days after the date such information is made available shall be considered by the Administrator in making his final decision on the application. No later than 10 days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Administrator shall consider the applicant's

response in making his final decision. All comments shall be made available for public inspection in at least one location in the region in which the source would be located.

(v) The Administrator shall take final action on an application within 30 days after the close of the public comment period. The Administrator shall notify the applicant in writing of his approval, conditional approval, or denial of the application, and shall set forth his reasons for conditional approval or denial. Such notification shall be made available for public inspection in at least one location in the region in which the source would be located.

(vi) The Administrator may extend each of the time periods specified in paragraph (e)(1)(ii), (iv), or (v) of this section by no more than 30 days or such other period as agreed to by the applicant and the Administrator.

[40 FR 25004, June 12, 1975]

(2) Any owner or operator who constructs, modifies, or operates a stationary source not in accordance with the application, as approved and conditioned by the Administrator, or any owner or operator of a stationary source subject to this paragraph who commences construction or modification after June 1, 1975, without applying for and receiving approval hereunder, shall be subject to enforcement action under Section 113 of the Act.

(3) Approval to construct or modify shall become invalid if construction or expansion is not commenced within 18 months after receipt of such approval or if construction is discontinued for a period of 18 months or more. The Administrator may extend such time period upon a satisfactory showing that an extension is justified.

(4) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with

the control strategy and all local, state, and Federal regulations which are part of the applicable State Implementation Plan.

(f) *Delegation of authority.* (1) The Administrator shall have the authority to delegate responsibility for implementing the procedures for conducting source review pursuant to paragraphs (d) and (e), in accordance with subparagraphs (2), (3), and (4) of this paragraph.

(2) Where the Administrator delegates the responsibility for implementing the procedures for conducting source review pursuant to this section to any Agency, other than a regional office of the Environmental Protection Agency, the following provisions shall apply:

(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropriate State and local air pollution control agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does not have continuing responsibilities for managing land use, such agency shall consult with the appropriate State and local agency which is primarily responsible for managing land use prior to making any determination required by paragraph (d) of this section.

[40 FR 25004, June 12, 1975]

(ii) A copy of the notice pursuant to paragraph (e)(1)(ii)(c) of this section shall be sent to the Administrator through the appropriate regional office.

(3) In accordance with Executive Order 11752, the Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be delegated, other than to a regional office of the

Environmental Protection Agency, for new or modified sources which are owned or operated by the Federal government or for new or modified sources located on Federal lands; except that, with respect to the latter category, where new or modified sources are constructed or operated on Federal lands pursuant to leasing or other Federal agreements, the Federal Land Manager may at his discretion, to the extent permissible under applicable statutes and regulations, require the lessee or permittee to be subject to a designated State or local agency's procedures developed pursuant to paragraphs (d) and (e) of this section.

(4) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be redelegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are located on Indian reservations except where the State has assumed jurisdiction over such land under other laws, in which case the Administrator may delegate his authority to the States in accordance with subparagraphs (2), (3), and (4) of this paragraph.

[39 FR 42510, December 5, 1974]

APPENDIX E

Other Petitioners in the Consolidated Proceedings Below

The following parties were other petitioners in the consolidated proceedings below:

Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, Puget Sound Power & Light Company, Washington Water Power Company, Pacific Coal Gasification Company, Transwestern Coal Gasification Company, The Dayton Power and Light Co., Kentucky Power Company, Ohio Edison Company, Ohio Power Company, Cincinnati Gas & Electric Company, The Cleveland Electric Illuminating Company, Columbus and Southern Ohio Electric Company, Sierra Club, The Washington Metropolitan Coalition for Clean Air, New Mexico Citizens for Clean Air and Water, Oregon Environmental Council, Sally Rodgers, John Tanton, Susan L. Moore, Stephen Winter, the State of New Mexico, the State of Nevada, Buckeye Power, Inc., Ohio Valley Electric Corporation, Indiana-Kentucky Electric Corporation, Indiana & Michigan Electric Corporation, Indiana Statewide Rural Electric Cooperative, Inc., Indianapolis Power and Light Company, Northern Indiana Public Service Company, Public Service Company of Indiana, Inc., Southern Indiana Gas and Electric Company, Utah International, Inc., Utah Power and Light Company, Public Service Company of Colorado, Colorado-Ute Electric Association, Platt River Power Authority, Cheyenne Light, Fuel and Power Company, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Western Energy Supply and Transmission Associates, Arizona Public Service Company, Arizona Power Cooperative, Inc., Nevada Power Company, Salt River Project Agricultural Improvement and Power District, San Diego Gas & Electric Company, Southern California Edison Company, Tucson Gas & Electric Company, Edison Electric Institute, and the Kentucky Utilities Company.